# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. [redacted]29.

SOLOMON R. WAGG, APPELLANT,

vs.

MARY B. HERBERT, LEROY M. BROWN, JOHN P.
ROOKSTOOL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
OKLAHOMA.

FILED DECEMBER 2, 1907.

(20,916.)

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1908.

## No. 212.

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SOLOMON R. WAGG, APPELLANT,

*vs.*

MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROOKSTOOL, ET AL.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a No. 1946.

S. R. Wagg, Plaintiff in Error,
*vs.*
Mary B. Herbert et al., Defendants in Error.

Appeal from the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States.

1 In the Supreme Court of Oklahoma Territory.

No. 1946. In Equity.

Solomon R. Wagg, Otherwise Known as S. R. Wagg, Plaintiff in Error,
*vs.*
Mary B. Herbert, Leroy M. Drown, John P. Roodstool, William A. Rookstool, Edna D. Rookstool, Gerturde M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a Corporation), Ef-ie P. Gilbert, Jas. W. Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a Corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, Frank Porter, Noah A. Miller, A. R. Andrean, and Irene Lanning, Defendants in Error.

United States of America to Mary B. Herbert and E. M. Clark, her attorney, and Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gerturde M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David H. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a Corporotion), Effie P. Gilbert, Jas. W. Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a Corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, Frank Porter, Noah A. Miller, A. R. Andrean, and Irene Lanning, Defendants in Error, and Wrightsman & Diggs, their attorneys, Greeting:

Whereas, the above named Solomon R. Wagg has appealed to the Supreme Court of the United States from a decree and judgment in

the above entitled cause and court heretofor- made and entere
2 therein on the 12th day of October, 1907, in your favor, an
has duly filed the security for such appeal required by law
now therefore you are hereby cited to appear before the Suprem
Court of the United States at the City of Washington on the 27t
day of November, 1907, at eleven O'clock in the forenoon of tha
day to do and receive that which may justly be done in the premises

Given under my hand at Oklahoma City in the Territory of Oklahoma this 28th day of October, 1907.

B. F. BURWELL,
*Associate Justice of the Supreme Court*
*of Oklahoma Territory.*

[Seal Supreme Court, Territory of Oklahoma.]

Attest:
BENJ. F. HEGLER,
*Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

We hereby accept service of foregoing citation this Nov. 1st, 1907.

WRIGHTSMAN & DIGGS,
*Attorneys for All D'f'ts in Error Except Mary B. Herbert.*

Filed Nov. 8, 1907.
BENJ. F. HEGLER,
*Clerk Supreme Court.*

I hereby acknowledge service of foregoing citation this Nov. 2" 1907.

E. M. CLARK,
*Attorney for Mary B. Herbert.*

Filed Nov. 8, 1907.
BENJ. F. HEGLER,
*Clerk Supreme Court.*

3 [Endorsed:] No. 1946. Solomon R. Wagg, Plaintiff in Error, *vs.* Mary B. Herbert *et al.*, Defendants in Error. In the Supreme Court, sitting at Guthrie, Okla. Action in Equity. Citation. Filed Nov. 8, 1907. Benj. F. Hegler, Clerk Supreme Court. Poe, Biddison, Campbell & Eagleton, Tulsa, Oklahoma, Attorneys for Plaintiff in Error.

4 In the Supreme Court of Oklahoma Territory.

No. 1946. In Equity.

SOLOMON R. WAGG, Otherwise Known as S. R. WAGG, Plaintiff in Error,

*vs.*

MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROOKSTOOL, WILLIAM A. ROOKSTOOL, EDNA D. ROOKSTOOL, GERTRUDE M. MARTIN, THE CHRISTIAN CHURCH, EFFIE S. GRIFFIN, DICKERSON, GOODMAN, SMILEY LUMBER COMPANY, DAVID B. HOLLER, SAMUEL R. HULL, M. E. HULL, E. R. LANE, THOMAS H. WILLIAMS, THOMAS B. ANDREAN, JOHN B. MEYERS, C. I. GREEN, H. C. BERWICK, FIRST NATIONAL BANK OF CLEVELAND (a Corporation), EFFIE P. GILBERT, JAS. W. EAGLIN, V. MAY EAGLIN, GRACE HAUNERKAMPF, J. T. KIGGINS, GEORGE LEE, WILLIAM R. HOWELL, R. L. BURT, CHAS. E. FUNK, JOE S. ROGERS, S. R. KEELING, ANNIE BERWICK, KATE WYRICK, THE TRIANGLE BANK (a Corporation), DORA A. DUNCAN, GEORGE FARABEE, JOHN SEGAN, WILLIAM SMITHSON, JOSEPH ALDERSON, J. J. ALDERSON, THOMAS CLAWSON, J. S. SEWELL, S. R. DONGES, FRANK PORTER, NOAH A. MILLER, A. R. ANDREAN, and IRENE LANNING, Defendants in Error.

To the honorable judges of the Supreme Court of Oklahoma Territory:

The Plaintiff in Error above named conceives himself ag-rieved by the decree made and entered in this cause in the trial court on the 19th day of May, 1905, and by the judgment of the Supreme Court of said Oklahoma Territory affirming said decree in all matters and things, and he alleges that there is manifest error committed to the injury of this petitioner, plaintiff in error, by the said original decree and by the determination of said Supreme Court. This petitioner states that his reasons for said appeal are specified in the assignment of errors filed herewith. He further alleges that this appeal is one which may be taken from the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States and that the amount in controversy, exclusive of costs, is more than six thousand dollars ($6000).

Wherefore he prays that this appeal may be allowed; that 5 the transcript of the record and of the proceedings, evidence and papers upon which said order and decree were founded after due authentication may be sent to the Honorable Supreme Court of the United States.

BIDDISON, CAMPBELL & EAGLETON,
*Att'ys, Plaintiff in Error.*

October 28th, 1907.

6 [Endorsed:] No. 1946. Solomon R. Wagg, Plaintiff in Error, *vs.* Mary B. Herbert *et al.*, Defendants in Error. In

the Supreme Court, sitting at Guthrie, Okla. Action in Equity. To the Honorable Judges of the Supreme Court of Oklahoma Territory. Petition for Appeal. Poe, Biddison, Campbell & Eagleton, Tulsa, Oklahoma, Attorneys for Plaintiff in Error. Filed Oct. 29, 1907. Benj. F. Hegler, Clerk Supreme Court.

7 In the Supreme Court of Oklahoma Territory.

No. 1946. In Equity.

S. R. WAGG, Plaintiff in Error,

*vs.*

MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROOKSTOOL, WILLIAM A. ROOKSTOOL, EDNA D. ROOKSTOOL, GERTRUED M. MARTIN, THE CHRISTIAN CHURCH, EFFIE S. GRIFFIN, DICKERSON, GOODMAN, SMILEY LUMBER COMPANY, DAVID B. HOLLER, SAMUEL R. HULL, M. E. HULL, E. R. LANE, THOMAS H. WILLIAMS, THOMAS B. ANDREAN, JOHN B. MEYERS, C. I. GREEN, H. C. BERWICK, FIRST NATIONAL BANK OF CLEVELAND (a Corporation), EVIE P. GILBERT, JAS. W. EAGLIN, V. MAY EAGLIN, GRACE HAUNERKAMPH, J. T. KIGGINS, GEORGE LEE, WILLIAM R. HOWELL, R. L. BURT, CHAS. E. FUNK, JOE S. ROGERS, S. R. KEELING, ANNIE BERWICK, KATE WYRICK, THE TRIANGLE BANK (a Corporation), DORA A. DUNCAN, GEORGE FARABEE, JOHN SEGAN, WILLIAM SMITHSON, JOSEPH ALDERSON, J. J. ALDERSON, THOMAS CLAWSON, J. S. SEWELL, S. R. DONGES, FRANK PORTER, NOAH A. MILLER, A. R. ANDREAN, and IRENE LANNING, Defendants in Error.

UNITED STATES OF AMERICA,
*Indian Territory, Western District, ss:*

Arthur J. Biddison, Oscar M. Lancaster, and Leroy M. Drown, each being duly sworn, on his oath says: That he is well acquainted with the above entitled action and the proceedings therein, and is well acquainted with the property sought to be recovered, and with the property actually recovered by Mary B. Herbert against S. R. Wagg therein, and is well acquainted with the value thereof. And with the amount in controversy in this case. And each being further duly sworn, says; That the amount in controversy in this action at the time of the rendition of the decree in the District Court ever since has been and now is more than six thousand dollars ($6000), exclusive of costs and that the value of the property and money actually recovered by the said Mary B. Herbert from the said S. R. Wagg by the decree in this action was at the time of the rendition of such decree, ever since has been, and now is more than six thousand dollars ($6000).

ARTHUR J. BIDDISON.
OSCAR M. LANCASTER.
LEROY M. DROWN.

Subscribed and sworn to before me this 26th day of October, 1907.

[Seal L. K. Cone, Notary Public, Western Judicial District,
Tulsa, Ind. Ter.]

L. K. CONE,
*Notary Public.*

My Commission expires Aug. 24, 1911.

[Endorsed:] No. 1946 S. R. Wagg *vs.* Mary B. Herbert Affidavits of Biddison, Lancaster and Drown as to amount in controversy. Filed Oct. 29 1907 Benj. F. Hegler, Clerk Supreme Court.

8 In the Supreme Court of Oklahoma Territory.

No. 1946. In Equity.

S. R. Wagg, Plaintiff in Error,
*vs.*
Mary B. Herbert, Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gertrude M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a Corporation), Evie P. Gilbert, Jas. W. Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a Corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, Frank Porter, Noah A. Miller, A. R. Andrean, and Irene Lanning, Defendants in Error.

### *Assignment of Errors.*

Come now the above named plaintiff in error and says that there is manifest error in the record, proceedings, judgement and decree in this cause and in this court, and that the said decree is against the just rights of this plaintiff in error, and plaintiff in error assigns the following reasons therefor:

1. The petition does not state facts sufficient to constitute a cause of action.
2. The Court erred in holding that the said petition stated facts sufficient to constitute a cause of action.
3. The evidence does not prove a cause of action.
4. The Court erred in holding that the evidence proves a cause of action.
5. The Court erred in holding that the question before the court was a question "Whether a deed which purports upon its face to be

an absolute deed was in reality a deed or mortgage," no such
9 question being presented by the pleadings or evidence.

6. The Court erred in holding that "extraneous evidence is admissible to show that the deed relied on in this case was only a mortgage," no such issue being presented by the pleadings.

7. The Court erred in holding that the transaction in question in this case "was in substance and effect a loan of money upon the security of a farm," no such issue being presented by the pleadings or the evidence.

8. The Court erred in holding "That to insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise they may appear to be," no such question being presented by the pleadings or the evidence.

9. The Court erred in holding that the purchase of mortgaged premises by the mortgagor may in any case be decreed to be a mortgage transaction and that the deed given in pursuance of a purchase can in any case be decreed to be a mortgage.

10. The Court erred in holding that fraud and undue influence and the unfairness of a transaction and unconscionable advantage either together or singly constitute ground for declaring an actual purchase to be a mortgage.

11. The Court erred in holding that a sale of property to a mortgagee in Oklahoma is to be scrutinized to see whether any undue advantage has been taken of the mortgagor, it being provided by Section 10 of Chapter 50 of the Revised Statutes of Oklahoma of 1903 that "Notwithstanding an agreement to the contrary a lien and contract for a lien transfers no title to the property subject to the lien."

12. The Court erred in determining and seeking to determine in this cause the question whether the transaction complained of was a sale or a mortgage, it being specifically set out in plaintiff's petition that the transaction was a sale.

13. The Court erred in holding that it was of great import-
10 ance in this case "to inquire whether the consideration was
adequate to induce a sale" as a circumstance tending to show that the transaction complained of was a mortgage.

14. The Court erred in holding that under the circumstances the plaintiff was not guilty of laches.

15. The Court erred in holding that under the circumstances of this case the plaintiff was not guilty of acquiescence.

16. The Court erred in holding that the plaintiff was not estopped by her conduct and by the sale which she made of a portion of the land conveyed to her by plaintiff in error at the time of the final settlement, and thereby ratifying and taking conscious advantage of the transaction.

17. The Court erred in holding that the trial court did not err in overruling the motion for a new trial made by plaintiff in error.

18. The Court erred in holding that the court below did not commit error in the admission of evidence offered by plaintiff below and admitted over defendant's objection in the following particulars, to-wit:

The memorandum of Sept. 30th, 1898 which with the proceedings in the trial court thereon being as follows:

Mr. Clark: Now, we have here something that was introduced at the last term of the court. I don't know how it got into the papers or where it came from; but it was in as a part of the stipulation, and seems to have accompanied that letter of September 30, 1898, taken from copy book, page 974. I think that is where it came from.

Thereupon Mr. Clark read the same, as follows:

"*Order for Delivery of Deed.*

Cleveland, Oklahoma, *Sept. 30th,* 1898.

For value received, receipt of which is here acknowledged We, Mrs. and Mr. Herbert husband and wife executors of a certain Mortgage to S. R. Wagg of Appleton, Wis., have executed a warrantee deed carrying the land mentioned in the above mortgage; such deed to be held in escrow by the Bank of Cleveland in trust for the further protection of the mortgage as hereafter described.

It is agreed and understood that if the mortgagor is in default of interest for six months after the same is due and payable, the Bank of Cleveland is hereby authorized and instructed to deliver the aforesaid deed to S. R. Wagg or his order.

Witness my hand and seal this —— —— ——. In the presence of,

(Signed) MARY B. HERBERT,
W. H. HERBERT.

11 Mr. Clark: I will state, as I understand it, this was produced last term of court from that record. I- *h*as written on here in lead pencil—I don't understand that was ever signed by the Herberts, but whether it was or not, it bears the lead pencil inscription "Mary B. Herbert, W. H. Herbert." Its only production in this case has come from Mr. Wagg, which we submit is his understanding of the terms of the escrow.

Mr. Biddison: We object to it as irrelevant and immaterial, and simply a matter of negotiation, that never was concluded between the parties. There is no pretention that it was ever signed.

The Court: The Objection is overruled at present:

Mr. Biddison: Exception.

19. The Court erred in holding that the original escrow deed could not be taken from the bank by Wagg and recorded except after six months default in interest as provided by this improperly admitted memorandum, the same being in contravention of the terms relied upon by plaintiff below as shown by the allegations of her second amended petition and "Exhibit D" attached thereto wherein it is provided that the escrow deed was to be delivered to Wagg in the event of default of interest or other terms for six months.

20. The Court erred in holding that "It is to be presumed that the Court, sitting as a Chancellor, only considered material, competent and relevant testimony in making up its findings and rendering the decree in this case," when it admitted irrelevent, incompetent and immaterial testimony over objections to its relevence, competency and materiality and thereby held that it was relevent, competent and material.

21. The Court erred in holding that the trial court did not err in admitting in evidence the letter from L. M. Drown to S. R. Wagg dated "Cleveland, Oklahoma, July 29th, 1898," which together with the proceedings as to its admission is as follows in the trial court:

Mr. Clark: The next letter we offer is one from L. M. Drown, the son of A. A. Drown, who wrote the other, to S. R. Wagg.

Thereupon Mr. Clark read the same as follows, to-wit:

"Cleveland, Okla. *July* 29, 1898.

Mr. S. R. Wagg, Appleton Wis.:

12 Dear Sir and Friend: In reply to yours of the 23rd inst regarding Herberts 80 acres, will say that I have had a talk with a man whom I consider the most conservative, cautious business man in Cleveland and a man of integrity.

He has been in business here over three years, and is as well acquainted with the country as anyone here. His name is C. A. Soderstrom. He says if this land were put up and sold at auction next week, it would undoubtedly bring $15.00 per acre, cash for its intrinsic value as farm land.

He says that a claim laying south of Herbert's farther from town, which has never been deeded from the Government sold within the last year at $14.37 to the acre at $2300 for 160 acres. Now Herbert's is undoubtedly much more valuable as he has his deed from Uncle Sam.

This man tells me that the Bank of Pawnee has loaned over $2000 on 120 acres of land laying north of town which is as good farming land but not as well located. I think these are as near rock bottom as you can get regarding that land. Regarding a lawyer, it seems that W. L. Eagleton, of Pawnee, Okla. is considered the best posted and most reliable man in this section.

Your draft came to hand all O. K. this evening. Thanks for your promptness. Those blank notes are all yours but I will get same from the bank tomorrow and send them to you. It is getting late and I must close. Will be more than pleased to be of any possible assistance to you down here. Let me know whenever I can serve you. With regards to all, I am,

Very sincerely,

L. M. DROWN.

Mr. Clark: We offer that letter in evidence.

Mr. Biddison: We object to the materiality and relevancy of the letters. It is simply an offer to show by inference what they don't have any direct evidence of.

The Court: Well, it simply shows what information was conveyed to him at that time, and which he presumably acted upon. Objection overruled.

Mr. Biddison: I understand, if the court please, that this is the declaration of a man trying to get a loan for Mr. Herbert.

The Court: I understand that. It is the information he had. If he had other information that he acted upon, it is competent to show it. Objection overruled.

Mr. Biddison: Exception.

22. The Court erred in holding that the trial court did not err in admitting a letter signed by S. R. Wagg dated Appleton, Wisconsin, Sept. 3, 1898, and which letter and the proceedings with reference to the admission thereof is as follows:

Mr. Clark: We now offer in evidence letter from S. R. Wagg, written September 3, 1898.

The Court: To whom.

Mr. Clark: To one of the Drowns. It does not say.

Thereupon Mr. Clark read said letter, as follows:

Appleton, Wis., *Sept.* 3, 1898.

My Dear Mr. Drown: I enclose your letter from Mr. Mayo. It looks fair on its face and if Herbert got the money as stated, from Mayo and his friends, why I want to know it.

13 I do not want to get drawn into any legal question at all. I shall not go over $1000.00 loan in any event, interest off in advance for 6 months. It is Herbert's business to clear matters up and not mine. I also enclose you Herbert's reply to my letters to him. 175 men with Mayo is quite a lot of them and at $50.00 each it is quite a sum if any besides Mayo claim it. Do not show these letters (but return to me after reading) except in strict confidence. Get at the facts and write me. If Mayo's object in writing me was to save me trouble and loss, I want to appreciate it properly by treating his letter with courtesy.

Yours truly, S. R. WAGG.

Mr. Clark: We offer that letter in evidence.

Mr. Biddison: We object to it as incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

Mr. Biddison: Exception.

23. The Court erred in holding that the trial court did not err in admitting a letter from S. R. Wagg to W. E. Deem dated "April 21, 1901," and which letter and the proceedings with reference to the admission thereof is as follows:

Judge Dale: We now offer in evidence the copy of the letter.

Mr. Biddison: To which we object as incompetent, irrelevant, and immaterial, and the proper foundation has not been laid.

The Court: Objection overruled.

Mr. Biddison: Exceptions.

Thereupon Judge Dale read the said letter as follows:

"April 21st, 1901.

Mr. W. E. Deem, Cleveland, Okla.

My Dear Sir: Your inquiry at hand. If you want to buy my land west of Cleveland see Leroy M. Drown of that city.

Yours, S. R. WAGG."

24. The Court erred in holding that the court below did not err in admitting the letter from Drown to Wagg dated "Nov. 8, 1901," and which letter and proceedings with reference to the admission thereof is as follows:

Judge Dale: Here is a letter, Mr. Biddison, of November 25, 1902, with reference to the sale of a lot of lots there, and in this connection perhaps it is not necessary to read it; we may take occasion to read it later.

Judge Dale: November 8, 1901, from Mr. Drown to Mr. Wagg.

Thereupon Judge Dale read the same as follows, to-wit:

"Dear Mr. Wagg: There is going to be a sharp advance here in real estate, before a great many people realize it——

Mr. Biddison: We object to this as entirely immaterial and irrele-
vant. Here is a letter long after the whole transaction; here
14 is a friend writing to his friend, suggesting investments in
that section of the country, long after this last settlement is
made, and can have no possible connection with it.

Judge Dale: It throws considerable light on the manner in which they thought they were dealing with this woman; all these letters do; they show they knew they were taking advantage of her, is my understanding.

The Court: Proceed. Objection overruled.

Mr. Biddison: Exception.

Thereupon Judge Dale continued to read from said letter:

"I am not pushing our lots now. We might as well get the benefit of the raise on them as to give it to some one else. I can handle this in my own name, and notify you of each transaction."

25. The Court erred in holding that the court below did not err in admitting the testimony of W. T. Litten as to the value of the land in controversy, and which testimony with the proceedings in reference thereto is as follows:

W. T. Litten, being produced and sworn as a witness on behalf of the plaintiff, testified as follows:

Judge Dale: The introduction of this particular witness at this time, if the court please, is out of order. He desired very much to get home this evening, and we thought we would accommodate him.

The Court: Proceed.

Judge DALE:

Q. You may state your name to the court.

A. W. T. Litten.

Q. Where do you live, Mr. Litten?

A. I live at Blackburn now.

Q. Did you ever live in the city of Cleveland?

A. Yes, sir.

Q. For what time?

A. About seven years.

Q. Beginning what time?

A. The spring of 1904—1894.

Q. When did you leave that city?

A. July 1900.

Q. 1900 or 1901?

A. 1900, I believe.

Q. Were you acquainted with the tract of land known as the Herbert-Wagg tract, lying immediately west of the town of Cleveland?

A. Yes, sir.

Q. How far do you live now, how far is your residence now from the town of Cleveland.

A. The way we have to travel, we call it about fifteen miles.

Q. Will you tell the court—or, were you living in Cleveland at the time that townsite was organized there?

A. Not at the time it was organized. I came there the following spring, or a few months afterwards.

Q. Mr. Litten, how was the town of Cleveland laid out; how much land was laid out for that townsite?

A. I think eighty acres.

Q. How does this track in controversy, known as the Herbert-Wagg, lie, with reference to the 80 acre tract upon which the town of Cleveland was originally located?

A. Lies north and south, and on the west side of it; parallels it.

15 Q. This eighty-acre tract in controversy in this case is the west half of the southeast quarter of section eight, is it not?

A. Well, I couldn't remember those figures. I presume that is correct, but not having any date, I couldn't say.

Q. Mr. Litten, assuming that this is the eighty-acre tract, the Herbert land, did the town of Cleveland lie on the eighty immediately east?

A. Yes, sir.

Q. And this Herbert tract adjoined that on the west?

A. Yes, sir.

Q. What was the character of this land, this Herbert land?

A. Well, it is about the best land, except the bottom land, that there is in the townsite.

Q. How does it lie with reference to the town, is it slightly above, on an average, or below it, or how?

A. About on a level. The northwestern part of it, I think, is said to be a little above the original townsite of Cleveland, and the southern part of it is somewhat lower.

Q. About how large a place, in population, was Cleveland at the time you left there?

A. We estimated it to be about five hundred.

Q. Now, how was the land which lies to the east and to the south and to the north, for residence purposes, compared to this Herbert tract of land?

A. The land that lies to the east of what?

Q. Of old Cleveland, the old eighty.

A. Well there is no comparison at all.

Q. Why.

A. Well, it is not a desirable side of the town to live on. It is a rough piece of land, and all the tendency of the town was to go west and south, apparently.

Q. The tendency of the town was to go on to the Wagg eighty? The Herbert eighty?

A. Yes, sir.

Q. Did I ask you what your business was while you were in Cleveland?

A. I think not.

Q. What was it?

A. I was cashier in a bank.

Q. Were you acquainted with the value of land in and about the town of Cleveland during the time you resided there, and for a year subsequent to that time?

A. I think I was during the time I resided there. As to whether I was after I left there, would be a matter of judgment, I reckon.

Q. Now, Mr. Litten, do you think the prices of lands decreased or increased after you left?

A. They increased.

Q. Now, at the time you were there, just about the time you left there in the spring of 1900, I will ask you what, in your judgment, was the reasonable market value of the eighty-acre Herbert tract of land, taking into consideration its use for any purpose for which it might have been used, either for agricultural or townsite purposes, the purpose for which it would best sell, that it was best adapted to; what, in your judgment, was the best reasonable acre value of that land at that time?

Mr. Biddison: To which we object, at that time, as irrelevant and immaterial, the competency of the witness is not shown, and the value of the land at the time inquired about is entirely immaterial in the case.

Judge Dale: Well, the witness has testified it increased from the time he left there, and I am asking now the time he left there, so they could not be prejudiced by that at all.

The Court: What was the date of the second deed?

Mr. Biddison: May 28, 1901.

16 The Court: And the mortgage was executed in 1898?

Judge Dale: The first mortgage.

The Court: Objection overruled.

Mr. Biddison: Exception.

Judge **Dale**:

Q. You may answer the question; what was the acre value, in your judgment, for any purpose for which it was adapted?

A. The question is, what it was worth, in my judgment, when I left there?

Q. Yes, sir.

The **Court**:

Q. What would it have sold for on the market?

Judge **Dale**:

Q. What was the reasonable market value of the land?

A. Well, I would say about a hundred dollars an acre.

Q. Now, in your judgment, was it worth more or less in the spring of 1901, during the month of May, than it was worth in the spring of 1900?

A. It would be worth more, according to the circumstances surrounding it, would be my judgment.

Q. About how much more do you think it was worth in the spring of 1901 than in 1902—1900 than in 1901?

Mr. **Biddison**: Objected to, for the reason that the competency of the witness is not shown, irrelevant and immaterial.

The **Court**: Well, as to the question of the compet*necy* of the witness, I will sustain the objection, unless it is shown that he kept advised.

Judge **Dale**:

Q. Mr. Litten, were you over to Cleveland frequently or infrequently for about one year after you left there?

A. I can't say whether I was there very frequently or not. I was down some three or four times, I think, during the year, I think that was the year, if I am not mistaken, that there was some railroad talk, and we were visiting back and forth.

Q. Did the town of Cleveland grow in population from the spring of 1900 to 1901?

A. I wouldn't say; I didn't reside there.

Q. Did you notice whether it increased in its buildings or not?

A. I think but very little. It increased somewhat in value, the property, but very little in buildings, if I remember.

Judge **Dale**: Cross-examine.

Cross-examination by Mr. **Biddison**:

Q. In what way had it increased in value, Mr. Litten?

A. By reason of the almost decided decision of the railroad company to build the railroad down through there.

Q. When was the proposition decided and given out, that it was understood in that country, that the railroad was going to build there?

A. I don't think it was decided, if I remember right, until about

March, 1902, if I remember right, was the last letter I had from Mr. Finney, when he told me he had decided to take the Cleveland line.

Q. As a matter of fact, was there anything definite in the spring of 1901 at all?

A. In the spring it was not very definite, but we understood that there was enough money in Jennings, Cleveland and Hominy to carry it down there, and we gave it up, the Blackburn folks give it up in the spring of 1901.

Q. Where had you been from the spring of 1900 to the spring of 1901?

A. At Blackburn.

Q. All that time?

A. From the spring of 1900?

Q. Yes.

A. I remained in Cleveland until July, 1900.

Q. Where did you go then?

A. I went east and remained until about November, and
17 came to Blackburn in January, but I again went to Cleveland
before going to Blackburn.

Q. The land in controversy, in your judgment, in the spring of 1900 was worth one hundred dollars per acre?

A. Yes, sir.

Q. How long had it been worth that value, in your judgment?

A. For farming purposes I think it was as good land as any land I ever saw that has sold for a hundred dollars an acre, and I came from a section of the country where rock piles and shelly regions sold for that amount of money, and that is worth more.

Q. Where was that land you are comparing it with?

A. Eastern part of Ohio.

Q. You think this land was worth more than that land back there?

A. For agricultural purposes, yes, sir.

Q. How far from a railroad was this at the time?

A. Pawnee, I think, was our closest road.

Q. Was there a railroad in Pawnee at that time?

A. I am not sure, but I think so.

Q. Well, do you know whether it was or not?

A. Let me think a minute and I can tell you. Yes, sir, there was. I came to Pawnee on the railroad.

Q. In the spring of 1901?

A. Yes, sir.

Q. Well, in the spring of 1900, when you testified that this land was worth a hundred dollars an acre, was there a railroad in Pawnee?

A. I couldn't say.

**The Court:** Well, that is so remote, anyway.

**Mr. Biddison:**

Q. Had that land been increasing or decreasing in value for some time prior to the spring of 1900?

A. I should think it had been increasing, from the fact that a great many people wanted it.

Q. How much, in your judgment, had it been increasing, to what extent?

A. Well, I don't know. It would be a matter of opinion. Land had sold in that community all the way from forty-five to sixty dollars an acre, and had been selling for that up aroun*g* Blackburn, the same class of land, prior to that time.

Q. About what, in your judgment, was that land worth at the time the mortgage was made?

Judge Dale: Objected to as immaterial and irrelevant.

The Court: It goes to test his knowledge. He may answer.

Mr. Biddison:

Q. What was it worth at the time the mortgage was made?

Judge Dale: In 1898.

A. The market value of land about that time, the same class of land, was about forty to fifty dollars an acre, something like that.

Mr. Biddison:

Q. Do you recollect what your opinion on the value of this land was at that time?

A. I don't know that I gave any at that time.

Q. Do you know what your opinion was at that time on the value?

A. Yes, sir.

Q. I will ask you if you wrote Mr. Wagg your opinion on the value of that land about the time this mortgage was made?

A. I expect I did.

Q. I will ask you to examine this letter.

Here Mr. Biddison hands the witness a letter.

Q. Did you write that letter?

A. Yes, sir.

Mr. Biddison: We offer it in evidence.

Judge Dale: Let the witness look at it.

Mr. Biddison hands the letter back to the witness.

Mr. Biddison: We offer it in evidence.

18 A. That is correct; it does not change my opinion at all.

Judge Dale: I would like to have it read, that part you have to offer.

Thereupon Mr. Biddison read the same as follows:

G. W. Sutton, Presiden*d*. James Bigheart, Vice Prest.
W. T. Litten, Cashier.

Bank of Cleveland.

Incorporated 1895.

Capital Stock, $25,000.00.

CLEVELAND, O. T., Jul- 9, 1898.

S. R. Wagg, Esq., Appleton, Wis.

DEAR SIR: Replying to your favor of the 4th regarding the land you refer to, will say that upon careful consideration I would say that that the land in question would be good security for $1000. The farm joining on the North is now carrying $1600 and consists of 120 acres.

I should say for farming purposes any of this land is easily worth $25.00 per acre, and should we be fortunate enough to get a R. R. through here it would easily be worth $50 to $75 per acre.

As to the owners character &c. I scarcely know how to answer.

He is now and has been for three or four years a man of leisure, he is a Physician but does not practice, in short he does nothing whatever and should you make him a loan it is my opinion you will get the land sooner or later.

There is now about $600 on this land part of the same nearly $200. held by us, the balance by the "Arkansas Valley Bk" of Pawnee, O. T. The owner's name is W. H. Herbert, or rather the land is in his wife's name. I hope I have Answered you in full and beg to be at your service.

Yours, &c., W. T. LITTEN, *Csh.*"

The COURT: Anything further from this witness?

Mr. BIDDISON:

Q. You say lands in the vicinity of Cleveland about that time were selling for fifty and sixty dollars an acre?

A. No, I didn't say fifty and sixty. I said forty to fifty; forty to forty-five; along there; that is my recollection of it, sir.

Q. You were acquainted with the value, and sales of lands in the vicinity of and adjoining Cleveland about that time?

A. I remember some offers that were made, yes, sir.

Q. Do you recollect the sale of the Sam Kinney tract, immediately north of this tract, immediately north of Cleveland townsite, and north of the Herbert tract, selling in 1900?

A. That was sold after I left there. I know nothing about it.

Q. In the fall of 1900 you had gone away from there?

A. I had gone away.

Q. You don't know what that sold for?

A. No sir.

Q. Do you know what the Loterette eighty acres, joining the town of Cleveland on the northeast, sold for in the spring of 1899?

A. I don't remember. I know what I could have bought it for at one time.

Q. Do you know what the Powell tract, at the southeast of Cleveland sold for about that time?

A. That sold after I left.

Q. You don't call to mind any of these adjoining tracts of land, immediately joining Cleveland, or this tract in controversy, selling at or about that time.

19 A. No; I said I remember what they were offered for, and what they were put on the market at.

Q. You don't know of any of them selling at that time, though?

A. They didn't sell, no, sir.

Q. Do you know of the sales of any land in that vicinity, other than bottom lands, about that time?

A. No, sir.

Q. Anywhere in that vicinity?

A. There was a Jordan tract sold just east of the Herbert land—I mean west of the Herbert land, but I don't remember what it brought. It was sold under mortgage, I think.

Mr. BIDDISON: That's all.

Judge DALE: That is all, Mr. Litten.

W. T. LITTEN, being recalled for further cross-examination on behalf of the defendant, testifies as follows:

Cross-examination by Mr. BIDDISON:

Q. Were you a witness in this case at the former trial of the case, Mr. Litten?

A. I believe I was, yes, sir.

Q. Do you recollect testifying at that time?

A. I recollect trying to. The court and about four lawyers got mixed up in a question that was asked me, and I finally answered it.

Q. I will ask you if you recollect this question being asked you by Mr. Clark: "I will ask you what would be the fair value of that land about the 20th of May, 1901, for all purposes?" and then the court said, "State what, in your judgment, it was worth," and did you not answer, "Well, it couldn't be worth over fifty dollars, and I rather think forty dollars would have been a fair price for it."?

A. Yes, I presume I made that answer, but at the time there was a conflict arising between the attorneys, and my opinion was mixed as to the time that was in question. The question was first asked me as to the value of the land when the mortgage was made, and when the deed was made, and I now discover for the first time that there had been two deeds made to this land here, the evidence here today.

Q. I will ask you if your answer was not in response to this question by Mr. Clark: "I will ask you what would be the fair value of that land about the 20th of May, 1901, for all purposes," and if your answer was not, "Well, it couldn't be worth over fifty dollars, and I rather think forty dollars would have been a fair price for it."?

A. That is the record of the stenographer, is it? Is that the record of the stenographer? I want to know that.

The Court: Answer the question.

Mr. Biddison:

Q. It is.
A. Well, if he has got it that way, that is the record.
Mr. Biddison: That is all.

26. The Court erred in holding that the Court below did not err in admitting the alleged copy of a letter from Wagg to Diem dated Apr. 21, 1901, which letter and proceedings at its admission are as follows:

Judge Dale: I have another letter here of April 21, 1901, written by Mr. S. R. Wagg to Mr. W. E. Deem, which, I will say to the court, will be made competent on this ground: Mrs. Herbert went to Mr. Deem, and Mr. Deem, I believe, offered to loan her the money to take up this mortgage, or made arrangements with Mr. Deem, to buy a part of the land, I don't know which, but she will explain it. Mr. Deem wrote to Mr. Wagg, and on April 21, 1901——

20

Mr. Biddison: We object to the introduction of the letter, as incompetent, irrelevant, and immaterial, no sufficient foundation laid; and we object to the competency of the copy of that letter until we know something about what they are driving at. I object to it for the reason that the competency of the copy is not established.

S. R. Wagg, being produced as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Judge Dale:

Q. You were sworn in this case, I believe, this morning?
A. Yes, sir.
The Court: No, he has not been sworn.
Thereupon the witness was sworn.

Judge Dale:

Q. Mr. Wagg, examine this book, and state whether or not it is your copy book of letters you wrote?
A. That is my copy book.
Q. I will ask you to examine page 485, and state whether or not there appears there a copy of a letter written by you to Mr. Deem, the witness just on the stand?

Mr. Biddison: Objected to as calling for a conclusion, and irrelevant and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

A. That is the letter written by me, I wrote the letter.

Judge Dale:

Q. Did you mail it?
A. I don't know.
Q. Do you think you did?

A. I couldn't tell you anything about it.

Q. Haven't any idea about it; is that it?

A. I don't know. I wrote the letter, but I couldn't tell you anything further about it.

Q. Can you tell now, have you any ide*d* whether you mailed that letter, or not?

A. I can guess; the probability.

Q. Have you got the original of this letter in your possession at this time?

A. No, I have not.

Q. Do you know where it is?

A. No, I do not. I think I sent it to Roy Drown after I received it; I think I did. We would have been very glad to have been very glad to have sold that land to Mr. Deem at the time; I would.

Judge DALE: That is all. Cross-examine.

Mr. BIDDISON: I don't care to cross-examine.

27. The Court erred in holding that the court below did not err in admitting the testimony of John R. Skinner as to the value of the land in controversy, and which testimony with the proceedings thereto is as follows:

JOHN R. SKINNER, being produced and sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct-examination by Judge DALE:

Q. Where do you live, Mr. Skinner?

A. I live near Terlton; five miles west.

Q. Did you ever live at Cleveland?

A. No, sir.

Q. How near did you ever live to that city?

A. I am living nearer th*a*re now tha*t* I ever lived before.

Q. How far is that?

21 A. About seven miles.

Q. Is Cleveland your trading point?

A. Some little; very little.

Q. What is your business or occupation?

A. I am a farmer.

Q. W*h*ere you familiar with the town of Cleveland in the summer of 1901?

A. Well, yes, sir, somewhat.

Q. You know the location of this Herbert eighty-acre tract?

A. Yes, sir, I know that very well.

Q. You know how it lies in the City of Cleveland, do you?

A. Well it lies right joining the city of Cleveland.

Q. You know the character of the land?

A. Yes, sir.

Q. You are acquainted with Mrs. Herbert?

A. Yes, sir. I did know Mr. Herbert before he died.

Q. You were, in the summer of 1901, acquainted with the values of lands in and about the town of Cleveland?

A. Well, I don't know that I would be expert on that. The land laid very nice; a very nice piece of land, for farming purposes; it was a very desirable piece of land.

Q. How about the desirability of it for an addition to the town of Cleveland?

A. Well, it laid very pretty for that, I thought.

Q. I will ask you, Mr. Skinner, if the location of that land to the town of Cleveland was such as to create the reasonable belief that as the town grew it would go over on to this land?

A. Yes, sir, it appeared very plausible.

Q. How near was the business portion of Cleveland to this particular tract of land?

A. Well, I think about two blocks, perhaps; perhaps three; two, I think.

Q. What was the main business street of Cleveland at that time?

A. I don't know, sir, that I could tell the name of it; but it was about two blocks from the main business part of town.

Q. Was the business part of old Cleveland to the west side of the town, or to the east?

A. Sir?

Q. Was the main business part of old Cleveland to the west part of Cleveland, or to the east part of Cleveland?

A. East; east of this land.

Q. I mean the old town of Cleveland, the eighty acres——

A. It was west; the eighty acres was immediately west.

Q. Now, in the town of Cleveland, where was the main business street?

A. Well, I don't know that I am familiar with the names, except possibly with the man that run that hotel, and the first bank they started there, and Martin, and I believe several of the business men. I don't know the names of the streets.

Q. Mr. Skinner, how long have you lived down in that vicinity?

A. I have not lived there very long; only about six months,—about five months.

Q. How long have you lived in the vicinity of Cleveland?

A. I lived in Blackburn ever since the opening.

Q. Ever since the opening of the country?

A. Yes, sir.

Q. I will ask you if you ever made a particular examination of this eighty-acre tract in question, before it was platted, with a view to purchasing it and platting it for townsite purposes, or going in with others and platting it for townsite purposes?

A. Yes, sir, I had such a thought at one time.

Q. At what time?

A. I think it was in '95.

Q. In 1895?

A. Yes, sir.

22 Q. Mr. Skinner, did you inquire as to the value of land in and about that town at that time?

A. No, sir; no, sir.

Q. Did you afterward make any inquiry, or learn, about the values of land in and about the town of Cleveland?

A. No, sir.

Q. Do you know what lands were held at in and around there?

A. Yes, sir, I had an idea of the value of land.

Q. How did you get that idea, Mr. Skinner?

A. Two purposes; for farming purposes it was a very nice piece of land, without any prospects of a town; the piece of land laid very nice, and such land anywhere in Pawnee County would bring fifty dollars an acre now; and, in fact, I think a very fair value would be fifty dollars an acre for that land, for farming purposes.

Q. Now, taking into consideration the way it laid to the town of Pawnee—Cleveland, and its desirability for platting purposes, and the prospects of the growth of Cleveland, what would you say the reasonable market value of that land per acre was in the year 1901?

Mr. Biddison: Objected to, for the reason that the competency of the witness is not shown.

The Court: Overruled.

Mr. Biddison: Exception.

A. What was the question, please?

Judge Dale:

Q. Taking into consideration its desirability for platting purposes, as an addition to the town of Cleveland, in 1901, the summer of 1901.

A. Well, the prospects then were not very flattering for the town.

Q. Well, assuming that they were not very flattering, but taking nto question, now, the town of Cleveland, its probable future, whatever it might be, as that might appeal to the natural judgment f persons, and the desirability of *the* this tract of land for townite purposes, what do you say its reasonable value was?

A. Well, with the prospects of a growing town there, it would ave been a very good investment at a hundred dollars an acre, I hink.

Judge Dale: Cross-examine.

Cross-examination by Mr. Biddison:

Q. There was no prospect of a growing town there then, was here?

A. Well, the town had about matured then; there was no prospect.

Q. In the spring of 1901 was about the dark days for Cleveland, as it not?

A. I think later on was worst.

Q. It got worse after that?

A. I think so, yes, sir.

Q. You was residing at that time at Blackburn?

A. Yes, sir.

Q. Were you frequently down to Cleveland in the year 1901, the pring?

A. Yes, sir, several times.

Q. You were seeking investments down in that country, were you?

A. Well, I always thought a good deal of Cleveland, but it looked very gloomy, to go and look; but I had a desire to get in there.

Q. It looked good, if the town made a town?

A. Yes, sir.

Q. Nice location for a town?

A. Yes, sir.

Q. Do you know of any lands selling for townsite purposes in or about Cleveland at that time?

A. No, sir, I was not familiar with any sales made there.

Q. Do you know whether or not there was a demand in that section, or in or about that town, for an addition to the town in the spring of 1901?

23 A. I don't know, no, sir.

Q. Do you recall the fact as to whether or not a large part of the town of Cleveland, the original town, and lots adjoining this tract, where selling at that time for taxes?

Judge Dale: I object to that as immaterial.

A. I am not very familiar with that, but I think that some did, perhaps.

Judge Dale: Objected to as assuming.

The Court: It is not proving the fact; it is simply asking him for his information on the subject.

Judge Dale: He is assuming the fact and then asking the witness.

Mr. Biddison:

Q. There was a great deal of vacant property in Cleveland at that time?

A. Yes, sir, I think so.

Q. And a good deal of it on the side of town next to this tract, wasn't it?

A. Well, I don't know, sir, that I could locate it, but I think there was some vacant lots in there.

Mr. Biddison: That's all.

Judge Dale: That's all, Mr. Skinner.

Mr. Wrightsman: I want to recall Mrs. Herbert for further cross-examination, a couple of matters that I overlooked, with the consent of the court.

Judge Dale: She will probably be on the stand again.

Mr. Wrightsman: All right.

28. The Court erred in holding that the court below did not err in admitting the testimony of Simeon Mott as to the value of the land in controversy, which testimony is as follows:

SIMEON MOTT, being produced and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct-examination by Judge DALE:

Q. You may state your name to the Court.
A. Simeon Mott.
Q. Where do you live, Mr. Mott?
A. I live at Keystone, Pawnee County.
Q. Where is that from this place, Mr. Mott?
A. It is in the extreme southeastern portion of the county.
Q. Have you ever lived at any other place in this county?
A. Yes.
Q. Where?
A. I have lived in Pawnee.
Q. How long?
A. How?
Q. How long have you live- in Pawnee?
A. Four years.
Q. How long have you lived in this county?
A. Since the opening.
Q. What is your business, or occupation, or profession?
A. Why, at the present time?
Q. Yes, sir.
A. I am a carpenter.
Q. What has been your business in the past.
A. Surveying.
Q. Were you county surveyor—Well, are you a land owner in this county?
A. Yes.
24 Q. A farmer, also. Did you ever occupy any official position in this county?
A. I have.
Q. What was it?
A. County Surveyor.
Q. How long were you County Surveyor?
A. Six years.
Q. During what time?
A. From January, 1897, the following six years.
Q. Are you acquainted with the location of lands in Pawnee County pretty generally?
A. Yes, fairly well, I think.
Q. You surveyed considerable throughout the county?
A. Yes.
Q. Are you acquainted with the eighty acre tract known as the Herbert-Wagg tract, immediate- west of the old town of Cleveland?
A. I am.
Q. Did you do any surveying upon that eighty acre tract?
A. I did.
Q. At whose instance did you make any survey there?
A. At the instance of—a portion of it, Mr. Drown, I think, Mr. Roy Drown.

Q. At what time did you first—Did you subdivide this land for Mr. Drown and Mrs. Herbert?

A. Yes, I did.

Q. Did you afterwards subdivide the fifty-five acres into town lots?

A. Yes.

Q. At what time was that survey made, subdividing the land into town lots?

A. I think it was in July, 1901, if I remember correctly.

Q. Do you know at what time the plat was filed?

A. The subdivision into town lots was in August, I think.

Q. The other was made previous?

A. Yes.

Q. July?

A. I think it was; I wouldn't be positive about the date.

Q. It was platted as a townsite in August, 1901, is that correct?

A. Yes, sir.

Q. Who employed you to subdivide the fifty-five acres into town lots?

A. Mr. Drown.

Q. Mr. Roy Drown?

A. Yes, sir.

Q. How does this land lie with reference to the old town of Cleveland, immediately west of it?

A. Yes, sir.

Q. You may state whether or not at that time it was desirable for townsite purposes, if it laid nicely, describe it to the court.

A. Why, yes, I think it laid fairly well for townsite purposes; there is the portion known as the old townsite of Cleveland.

Q. To that portion?

A. Yes, I think so.

Q. Do you know whether or not since that time this Wagg addition has been used for townsite purposes?

A. Yes.

Q. Do you know about how long it was after you laid it out it was until they began putting up residences there?

A. Why, in a very short time there were a few *few* houses went up.

Q. Mr. Mott, are you acquainted with the values of lands in Pawnee county, the market values of lands in different locations of Pawnee County?

25 A. Why, to some extent, yes.

Q. Have you known of sales of properties in different portions of the county, and know what people held them at?

A. Yes.

Q. And what they sold them for. Have you heard what lands sell for?

A. At that time?

Q. Yes, or about that time.

A. Yes, I could call to mind some pieces of land.

Q. You know how this particular land in question was lying with reference to the old townsite of Cleveland, and its desirability for townsite purposes, you say?

A. Yes.

Q. In your judgment, what was the reasonable market value per acre of that fifty-five acres, for such purpose, along in December, 1901?

Mr. **Biddison**: Objected to, for the reason that the competency of the witness is not shown.

The **Court**: The witness has testified that he knew generally about values, but this being valued particularly for a certain purpose, it must be shown that he had some knowle-ge of values in that vicinity.

Judge **Dale**:

Q. Mr. Mott, do you know from the location of this land, the purpose for which it was best adapted, have you known as to the reasonable market value of that land?

A. Yes, I think I have.

Q. For what purpose, in your judgment, was it best adapted, and most valuable for?

Mr. **Biddison**: At what time, Judge?

Judge **Dale**:

Q. In summer of 1901.

A. Townsite purposes.

Q. Now, for townsite purposes, have you an opinion as to the reasonable market value of that land at that time?

A. Why, yes.

Q. How did you arrive at such opinion, what is your——

A. Why, by the price that they put upon the lots, is all the way I have.

The **Court**:

Q. What?

A. The price they put upon the lots, after it was surveyed.

Judge **Dale**:

Q. That is, the price the other party put upon it?

A. Yes.

Q. Well, independently of that, knowing the town of Cleveland—you were familiar with that town, were you not?

A. Yes, considerably so.

Q. Knew of its size, its location, etc. Now, taking into consideration those facts and circumstances, what, in your judgment, was the reasonable market value, per acre, of that fifty-five acres, for townsite purposes at that time?

Mr. **Biddison**: Objected to as irrelevant, and immaterial, and the competency of the witness not shown.

The **Court**: Overruled.

Mr. **Biddison**: Exception.

Judge Dale:

Q. You may answer the question, Mr. Mott.
A. Why, after it was put upon the market as town lots——

Mr. Biddison: Now, we object to the further answer.

Judge Dale:

Q. Well, I am just asking per acre, for the value of those fifty-five acres, Mr. Mott. It is immaterial whether——

The Court:

Q. What would it have sold for as an entire body, reasonable cash value?

Judge Dale:

Q. What would it have sold for, per acre, as an entire body, for any purpose for which it was most valuable?
A. I don't know that I understand the question.
Q. Well, I want, simply, to get at your judgment of the reasonable market value of this fifty-five acres tract of land, per acre, considering its prospects, and the location of the town of Cleveland, and the prospects for the town of Cleveland; what, in
26 your judgment, was the reasonable salable, market value of that fifty-five acres?

Mr. Biddison: That is objected to, as calling for a speculative answer, and argumentative.
The Court: Overruled.
Mr. Biddison: Exception.

Judge Dale:

Q. You may answer the question, the court says; the question which I have propounded.
A. Well, as I started to state before, the price that they put upon the lots——

Mr. Biddison: To that we object.
The Court: Yes, that is not a proper basis, because they might not have ever sold any.

The Court:

Q. Mr. Mott, if you are able, answer; or if you have a judgment on the question. What would the fifty-five acres of land have sold for, if it had been offered for sale on reasonable cash terms at that time, as a whole, considering any purpose for which it might be used.
A. Sold by the acre?
Q. No, sold as a whole, the fifty-five acres in a body.
A. Well, I don't know.
Q. He asks you to price it per acre.

Judge Dale:

Q. So much per acre.

A. I can't state.

Q. Have you no judgment as to the acre value of the entire tract of fifty-five acres?

A. Yes, I have a judgment, but I heard of nobody that wanted to buy, and I couldn't say. My judgment would have been that it would have been worth fifty dollars an acre.

Q. For what purpose?

A. Why, for—not that, even, for farming purposes; but it is close to the town, lying right by the town there; and its future prospects.

Q. Did you say it was desirable for townsite purposes?

A. Yes, sir.

Q. And you say that for townsite purposes it was worth fifty dollars an acre?

A. No.

Q. Well, how much was it worth for townsite purposes?

Mr. BIDDISON: Objected to for the reason that the competency of the witness is not shown.

A. I could answer that as to the time after it became a townsite.

Judge DALE:

Q. Well, assuming now that it was a townsite.

A. After it became a townsite, and laid out in lots, it was worth a hundred dollars an acre, I suppose.

Q. You think that would be the reasonable value of the land for that purpose?

A. Yes.

Judge DALE: Cross-examine.

Cross-examination by Mr. BIDDISON:

Q. What do you base that estimate of a hundred dollars an acre on, Mr. Mott?

A. Why, the price that they put the lots at.

Q. Do you know what the lots sold for, on an average, in that addition, when they were put upon the market?

A. I know some of them were priced to me from twenty to, I think, thirty-five dollars a lot.

Q. That is, after the streets and alleys had been surveyed out?

A. Yes sir.

Q. Do you know how many lots there was to the acre?

A. I think there was about five.

Q. Will you state the size of those lots?

A. I think the full blocks contained lots 50x150; I wouldn't be sure; I would have to see the plat.

27 Q. Wouldn't there be only about three of that size in an acre, Mr. Mott?

A. Then there were smaller lots.

Q. Wouldn't there be only about three lots in an acre of that size?

A. Yes, there would be more than that.
Q. Wouldn't be four, would there?

Judge DALE: I expect the court knows about how land is cut up. I have cut up a little of it.

Mr. BIDDISON:

Q. I will ask you if you know how many lots there was made out of the whole fifty-five acres?
A. I do not now know.
Q. Can you refresh your memory by reference to the plat?
A. I could.
Q. Is that the plat you made at that time? Is that the plat that you made?

Handing the Witness a plat.

A. Yes.

Mr. BIDDISON: We offer it in evidence, for the purpose of showing the extent of it.
Judge DALE: Just a moment.

Judge DALE:

Q. This here is the Wagg property, the whole of it?
A. Yes, sir.
Q. The fifty-five acres?
A. Yes, sir.

Judge DALE: That would be one hundred and eighty-nine lots. No objection to the plat. Let it be considered in evidence.

Mr. BIDDISON:

Q. You say these lots were offered to you from twenty to thirty dollars?
A. Yes.
Judge DALE: Twenty to thirty-five, I believe you said.
A. Yes, sir.

Mr. BIDDISON:

Q. Those were the better class of lots priced to you at that price?
A. No. The cheaper lots were some of those fractions on the west.
Q. They were priced at a less price than that?
A. No, not less than twenty.
Q. And the highest was thirty-five?
A. I think so, yes.
Q. Did you know of any other lands selling in that vicinity about that time, Mr. Mott?
A. No.
Q. Did you at that time have any general knowledge of the market value of lands in that vicinity?
A. Yes.
Q. Where were you living at that time, Mr. Mott?

A. I lived at Pawnee.
Q. Had you ever lived in Cleveland?
A. No.
Q. How close was the nearest you ever lived to Cleveland?
A. Sennett neighborhood.
Q. About how far?
A. Twenty miles.
Q. When you were there you were farming?
A. Yes.
Q. Was Cleveland your trading point?
A. No, not generally speaking.

Mr. Biddison: That's all.

29. The Court erred in holding that the court below did not err in admitting the testimony of John Crismon, and which testimony is as follows:

28 John H. Crismon, being produced and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Judge Dale:

Q. State your name to the court.
A. J. H. Crisman.
Q. Where do you live, Mr. Crismon?
A. Seven miles northwest of Pawnee.
Q. Have you ever held any official position in this county?
A. Yes, sir.
Q. What was it?
A. Sheriff of the county.
Q. For how long?
A. Two years.
Q. Have you familiarized yourself with the different portions of Pawnee County?
A. How is that?
Q. Are you familiar with the different parts of Pawnee County, the towns, and locations of towns, etc.?
A. Yes, sir.
Q. Were you familiar with the locations of the towns in the summer of 1901?
A. Yes, sir.
Q. Do you know where Cleveland is located?
A. Yes, sir.
Q. Do you know the location of this eighty-acre tract in controversy in this case?
A. Yes, sir.
Q. Do you know how it lies to the town of Cleveland?
A. I do.
Q. The character of the land?
A. Yes, sir.
Q. Are you familiar with the values of land in Pawnee County?

A. Well, I am to one section of the county; farm lands.

Q. Were you familiar with the values of farm lands about Pawnee County generally, during the year 1901? Were you sheriff at that time?

A. Yes, sir.

Q. Were you—do you know what lands sold for throughout the different parts of the county, what they were held at?

A. Farm lands, yes, sir.

Q. Now, do you know what lands were being offered for sale at, and held at, and sold at, around about Cleveland at that time?

A. No, sir, I do not.

Q. Do you know what farm lands were held at about the town of Cleveland, or in that vicinity, that section of the county, in the year 1901?

A. No, sir, I do not know that I do. I never paid any attention to that. I know what farms were selling for generally over the country, different classes of land.

Q. And did you know what town properties were worth, around different parts of the county, about that time; what they were selling at?

A. No, sir, not outside of Pawnee.

Q. Did you know about how much of a place Cleveland was at that time, in 1901?

A. I was in it quite a number of times, but I never paid any attention to what they claimed as the population of it.

Q. Well, you could form your judgment as to the population, could you not, Mr. Crismon, without inquiring of anybody about that?

A. Yes, sir.

Q. You say you were familiar with this eighty-acre tract of land; do you know how it lies to the town of Cleveland?

A. Yes, sir.

Q. I will ask you whether or not, in your judgment, it
29 was desirable for addition purposes to the town of Cleveland?

A. Why, yes, sir, I would think it would be fine residence property.

Q. I will ask you if, from your knowledge of the values of lands in Pawnee County, and your knowledge of the town of Cleveland, its prospects, and the location of this particular eighty-acre tract of land, you have an opinion at this time as to the reasonable market value of that eighty-acre tract of land for any purpose for which it might be used?

Mr. Biddison: Objected to as irrelevant and immaterial.

Judge Dale:

Q. In the summer of 1901?

Mr. Biddison: Same objection.
The Court: Objection overruled.
Mr Biddison: Exception.

Judge Dale:

Q. Have you an opinion upon that matter?

A. Yes, sir.

Q. Taking into consideration its location to the town of Cleveland, what, in your judgment, was the reasonable market value per acre of that eighty-acre tract of land in the summer of 1901?

A. Well, I would think a hundred dollars an acre would be the reasonable market value of it.

Judge Dale: Cross-examine.

Cross-examination by Mr. Biddison:

Q. You reside where, Mr. Crismon?

A. Seven miles northwest of Pawnee.

Q. Cleveland is about twenty-five miles southeast, in the opposite direction?

A. Yes, sir.

Q. You live somewhere over thirty miles from Cleveland?

A. Yes, sir.

Q. Did you know of any demand for real estate in the spring of 1901, for townsite purposes, or additions to the town of Cleveland?

A. I never paid any attention to the valuation of Cleveland town property. I don't know what town property was selling for.

Q. You know at that time there was a great deal of vacant property in the town of Cleveland?

A. You mean houses, or just va*n*cant land?

Q. Vacant land.

A. Yes, sir, there was plenty of land contiguous to Cleveland and around it.

Q. Well, there was plenty of va*n*can- land in the townsite of Cleveland in the spring of 1901, wasn't there?

A. Yes, sir.

Q. Do you know whether or not at that time a very large part of the lots of Cleveland were selling for taxes?

Judge Dale: Objected to as incompetent, and not the best evidence.

The Court: Objection sustained.

Mr. Biddison:

Q. Do you know whether or not there was any demand for town property at Cleveland in that spring?

A. No, sir, I don't know what the demand was.

Q. You don't know whether there was any property selling in that vicinity?

A. Not that I know of.

Q. You were not very well acquainted there were you John?

A. Pretty well acquainted with Cleveland, and have been since the opening.

Q. How frequently were you down there in the spring of 1901?

A. Oh, I don't think I was there over a half dozen times a year.

Q. When you were there you were most on official business?

A. On business, yes, sir.

Q. Did you know of any lands selling for town-sites, or
30 for additions to townsites, in Pawnee County, about that
time, in the spring of 1901?

A. No, sir. I don't think I paid any attention to it. Can't recollect now or any.

Q. What did you base your knowledge of the values on, or your judgment, rather, of the values of this land in the spring of 1901?

A. Well, I will tell you what I base my opinion on. Cleveland has always been considered a good little town, and enjoyed a good trade, and that is what I base my opinion on, and this land joining right up to the townsite. It is a guess proposition with me, of course, because I don't know what town property was selling for in Cleveland at that time.

Q. It is a guess proposition with you?

A. Yes, sir.

Mr. Biddison: That's all.

A. Just my opinion.

Redirect examination by Judge Dale:

Q. Just your opinion?

A. Yes, sir.

Judge Dale: That is all anyone can give. That's all. You gentlemen say you want to cross-examine Mrs. Herbert?

Mr. Biddison: Yes, sir.

30. The Court erred in considering upon the appeal the evidence of each and all the foregoing witnesses.

31. The Court erred in holding that the court below did not err in admitting the testimony of Mary B. Herbert as to her business experience, and which testimony is as follows:

Q. I will ask you, Mrs. Herbert, at the time these negotiations for the giving of this land deed were opened up, about the time your husband left Cleveland, what your business experience had been, whether or not you had conducted the business, or your husband had conducted it for the family.

Mr. Biddison: Objected to as irrelevant.

The Court: Overruled.

Mr. Biddison: Exception.

The Court:

Q. Answer the question.

A. Why, I was entirely inexperienced in business matters. I never had transacted any business; my husband had always attended to it. If I understand your questions, it was up to that time.

32. The Court erred in holding that the court below did not err in admitting the testimony of Mary B. Herbert with reference to of-

fers for the hay upon the land in question, and which testimony was as follows:

Q. Now, had you, prior to that time, made any arrangements for disposing of that hay?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Biddison: Exceptions.

Mr. Clark:

Q. The court says you can answer the question.

31 A. Well, Mr. Nash, previous to that time, had called to my home, and said that he desired to buy the hay, that its lying so near Cleveland he could afford to give more for it, because it would save hauling, and he offered me a dollar an acre for the hay. That is, in the field, on the ground.

Mr. Biddison: We ask that that be stricken out as not responsive to the question.

Judge Dale: I don't see how it is not responsive.

Mr. Wrightsman: That is grass, Your Honor, and not hay.

The Court: You are not a farmer, I understand.

Mr. Wrightsman: Yes, Your Honor, I have that honor.

The Court: Farmers speak of their hay on the ground very frequently, as well as after it is cut. The question was whether she had made any disposition of it.

A. I had the offer of it, and I replied to Mr. Nash that I thought so, that I would communicate with my Husband, and let him know. And that was the way the matter rested when Mr. Wagg came.

33. The Court erred in holding that the court below did not err in admitting the testimony of Mary B. Herbert as to why she made no effort to sell the land to a party in Muskogee, which testimony was as follows:

Q. Well, I don't care anything about the reason for it. Now, I will ask you remember, simply to call your mind to the matter, of going to Muskogee to negotiate a sale?

A. Yes, sir. Mr. Eagleton——

Q. Why didn't you do that?

Mr. Biddison: Objected to as irrelevant and immaterial.

Mr. Clark: Simply calling attention to the fact of the condition of the title.

The Court: Answer the question.

Mr. Biddison: Exception.

A. Because of the cloud on the title, was why I didn't go. I knew that people in Pawnee were located here where they could investigate it, and ask for information in regard to it, and whereas there I didn't know how I would go about presenting it to anyone, although I felt perfectly confident that I could secure a purchaser——

Mr. Wrightsman: Objected to as argumentative.

The Court: Well, never mind that.

Mr. Clark:

Q. Had you any particular reason for believing you could get the money in Muskogee if you were able to go there and show you had the title to the land?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Objection sustained.

Mr. Clark:

Q. Was there any person in Muskogee that had promised you to furnish you money, in case you required it to save the land?

Mr. Biddison; Objected to as irrelevant and immaterial.
Judge Bierer: To show the means of paying off the mortgage.
The Court: As I understand it, she has already stated she did not do that, because the title was not in condition.
Judge Dale: Perhaps you misunderstood the purport of her testimony. I asked Mr. Clark to ask her the question direct, if there was any person in Cleveland wanted to buy the land, and if she knew it.
The Court: At Cleveland, or Muskogee?
Judge Dale: At Muskogee. And I think he better ask it, and I think that will settle it.
32 Mr. Clark: I thought I had substantially asked it, but I will try it again.

Mr. Clark:

Q. I will ask you whether there was any person at Muskogee who had promised——
Judge Dale: No, who wanted to buy the land, direct.

Mr. Clark:

Q. Who had offered to furnish you the money. I want to put it that way first.

Mr. Biddison: Objected to as irrelevant and immaterial.

Mr. Clark:

Q. Or who had offered to buy the land.

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: She can answer that.
Mr. Biddison: Exception.

A. There was.

Mr. Clark:

Q. Who was it?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

A. It was Mr. John Cobb of Muskogee, John O. Cobb.

34. The Court erred in holding that the court below did not err in refusing the plaintiff in error the right to cross-examine Mary B. Herbert as to former admissions made by her with reference to her having consulted her attorney, and which testimony is as follows:

Mrs. Mary B. Herbert, being recalled for further cross-examination, testifies as follows.

Recross-examination by Mr. Wrightsman:

Q. Mrs. Herbert, you recall the fact of being a witness at the previous term of this court, concerning this same case, do you?

A. Yes, sir.

Q. With reference to the month of May, in the year 1901, I will ask you if this question was not put to you: "Q. Mrs. Herbert, had you not consulted attorneys during that time, and at that time, with reference to the effect of that deed? Answer: Consulted attorneys in May". Did you or not so testify?

Judge Dale: Objected to as immaterial, and not contradicting any of the testimony given.

Mr. Wrightsman: We submit it is material, and in direct contradiction to her testimony of last night, to the effect that she had not consulted attorneys until she consulted her counsel, Mr. Clark, the year that the suit was brought, which was in 1903, of and concerning these transactions.

The Court: That does not indicate what year.

Mr. Wrightman: I stated, Your Honor, as a predicate to my question, "referring to May, 1901".

Judge Dale: That is not all. It does not show that she consulted him about the effect of the deed.

The Court: Does the question and answer there disclose that it was in 1901?

Mr. Wrightsman: No, sir, except by inference. I stated first, with reference to May, 1901.

Mr. Clark: Counsel may draw the wrong inference.

Mr. Wrightsman: I will just go back a little.

Mr. Wrightsman:

Q. (Reading from manuscript.) "Question: Do you recall anything further in the conversation with him the following morning that you have not narrated? Answer: The extend of the conversation the following morning, as I recall it, was that I asked him about the indemnity" (I presume she means "redemption") "that I understood there was an indemnity law, and that my under-
33 standing was that the deed was not given to convey title, and
I didn't understand what he meant by having the deed recorded, I wanted to have a fuller understanding of what he meant to do, and his reply to me was, 'Whoever tells you that a deed does not convey title is no friend of yours'; and that he had been asked in Pawnee what he intended to do with his land down in Cleveland. That is the extent of the conversation. Question: That was the ex-

tent of the conversation? Answer: As I recall it, I think that is almost word for word.

Judge Dale: Who is that with,—Mr. Wagg?

Mr. Wrightsman: Yes, sir. I want to give what is just before that too. "Question: Now, did you make any inquiry of him at that time as to whether he had taken legal advise on this question? Answer: No, sir, I did not. Question: Had you taken legal advice on the question? Answer: No, sir, I had not. Qnestion: Mrs. Herbert, had you not consulted attorneys during that time and at that time with reference to the effect of that deed? Answer: Consulted attorneys in May." Now, I think that is clear as to the time.

Judge Dale: I don't think it is.

The Court: I don't, either. It may have been the May of any year inquired about.

A. That referred to this May——

Judge Dale: Never mind, Mrs. Herbert.

The Court: Objection sustained.

Mr. Wrightsman: Exception.

35. The Court erred in holding that the court below did not err in refusing to plaintiff in error the right to show by cross-examination of Mary B. Herbert that she herself first proposed the division of the mortgaged premises in settlement of the mortgage debt, and the proceedings with reference to which were as follows:

Q. Who suggested the division on the basis of twenty-five acres and fifty-five acres?

Mr. Clark: Wait a minute. I submit there is not evidence as to what that agreement between him and Mrs. Herbert was.

Mr. Wrightman: He has asked him if there is such a fact.

Mr. Clark: No, sir, he is telling him, and asking him.

A. It was a compromise on both sides——

The Court: Wait a minute. I sustain the objection. If there was an agreement, what the agreement is, is a proper matter to be determined.

Mr. Biddison: Exception.

36. The Court erred in holding that Wagg committed a fraud upon the Herberts when he procured the escrow deed from the bank and had it placed on record on December 26, 1899, and when he claimed title thereunder.

37. The Court erred in holding that plaintiff in error had no right to take possession of the premises and collect the rents under

34 the original mortgage and escrow deed.

38. The Court erred in finding that the plaintiff in error either took possession of the premises or collected rents therefrom under the escrow deed and original mortgage, there being absolutely no evidence that he did either, and the proof being explicit that he did neither, and the allegations of the petition and amended petition being that plaintiff at all times resided upon the land in controversy.

39. The Court erred in holding that Wagg had no right to claim title under the escrow deed and in holding that the escrow deed did not convey the legal title.

40. The Court erred in finding that Wagg ever claimed that the

row deed divested all plaintiff's title and interest in the property,
re being no evidence to support the same and abundant evidence
t he at all times admitted Herbert's right to redeem.

1. The Court erred in holding "That the taking of possession of
premises, collecting the rents, claiming the title to the land and
uring the final settlement deed was not only taking und-e advant-
of the mortgagors but was an unfair and unconscionable trans-
ion which cannot be upheld by a court of equity."

2. The Court erred in holding that the allegations in the petition
fraud, oppression, undue influence and inadequate consideration
sustained by the evidence.

3. The Court erred in holding that where a mortgage is a mere
upon the premises, as in this Territory, "It is not necessary to
ablish actual fraud but only constructive fraud, and that an un-
scious advantage was taken of the borrower".

4. The Court erred in holding that "The status of plaintiff in
or and defendant in error is clearly that of borrower and lender,
debtor and creditor, or mortgagor and mortgagee in possession",
same being in conflict with the pleadings in the case and the evi-
dence introduced thereunder.

45. The Court erred in holding that the doctrine of es-
toppel has no application in a case where a party might
reby have advantage from his own wrong.

6. The Court erred in refusing to review the sufficiency of the
dence to sustain the allegations of laches, acquiescence and estop-
in the amended answer.

7. The Court erred in holding that there was no laches or ac-
escence on the part of plaintiff below under the pleadings in
case.

8. The Court erred in holding that there was no error in the
ree in this case.

9. The Court erred in affirming the judgment and decree of the
rt below.

0. The Court erred in not reversing the judgment of the court
ow.

1. The Court erred in affirming the decree of the trial court ad-
ging the settlement deed to be a mortgage and decreeing a con-
t to have existed and to exist between plaintiff in error and said
ry B. Herbert which they never entered into; the measure of
ht and recovery by a mortgagor under Oklahoma Statutes being
ater than that of a defrauded grantor where conveyances by
udulent grantee have been made to third parties; as is alleged
be the case herein; Section 15 of Chapter 16 of the Revised
tutes of Oklahoma of 1903 providing as follows: "Sec. 15. Any
son purchasing or taking any security against real estate in good
h and without notice from one holding under an instrument
porting to be a conveyance, but intended as a security for the
ment of money and which instrument has been duly recorded
hout any other instrument explanatory thereof, shall be pro-
ed *to the extent of the purchase price paid or actual outlay occa-*

*sioned, with lawfull interest,* against all persons except those in actual possession at the time of such purchase or outlay."

36 52. The Court erred in reinvesting Mary B. Herbert, defendant in error, with the title to the property in controversy without first requiring her to do equity.

53. The Court erred in not requiring plaintiff below to put this plaintiff in error *in statu quo* as a condition of cancellation of the deed in controversy and in not decreeding plaintiff in error to have a lien upon the whole 80 acres described in his deeds and mortgage.

Wherefore the said S. R. Wagg, plaintiff in error and appellant, prays that said decree may be reversed and the judgment, decree and findings of the Supreme Court of Oklahoma Territory may be reversed and set aside and judgment ordered that plaintiff's petition and bill in equity be dismissed, or that a new trial may be ordered, as may be consistent with equity and justice.

BIDDISON, CAMPBELL & EAGLETON,
*Attorneys for S. R. Wagg Plaintiff in Error and Appellant.*

37 [Endorsed:] No. 1946. S. R. Wagg, Plaintiff in Error, *vs.* Mary B. Herbert *et al.*, Defendants in Error. In the Supreme Court, sitting at Guthrie, Okla. Action in Equity. Assignment of Errors. Filed Oct. 29, 1907. Benj. F. Hegler, Clerk Supreme Court. Poe, Biddison, Campbell & Eagleton, Tulsa, Oklahoma, Attorneys for Plaintiff in Error.

38 In the Supreme Court of Oklahoma Territory.

No. 1946. In Equity.

Sol[illegible]on R. Wagg, Otherwise Known as S. R. Wagg, Plaintiff in Error,

*vs.*

Mary B. Herbert, Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gertrude M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a Corporation), Efie P. Gilbert, Jas. *W.* Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William *R.* Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a Corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, Frank Porter, Noah A. Miller, A. R. Andrean, and Irene Lanning, Defendants in Error.

Comes now on this 28th day of October, 1907, the above named plaintiff in error by his attorney Arthur J. Biddison, and prays an ppeal from the decree and judgment in this cause and court, which appeal is by the undersigned judge of said court allowed, nd a penalty of the appeal bond if the same is to operate as a upersedeas, is fixed at seven thousand five hundred dollars ($7,500), ut if the same is not to operate as a supersedeas then the penalty f the appeal bond is fixed at two thousand dollars ($2000).

Witness my hand this 28th day of October, 1907.

B. F. BURWELL,
*Associate Justice of the Supreme Court of Oklahoma Territory.*

Attest:

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
*Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

39 [Endorsed:] No. 1946. Solomon R. Wagg, Plaintiff in Error, *vs.* Mary B. Herbert *et al.*, Defendants in Error. In the Supreme Court, sitting at Guthrie, Okla. Action in Equity. Appeal. Allowance and order fixing Bond. Filed Oct. 29, 1907. Benj. F. Hegler, Clerk Supreme Court. Poe, Biddison, Campbell & Eagleton, Tulsa, Oklahoma, Attorneys for Plaintiff in Error.

40 In the Supreme Court of Oklahoma Territory.

No. 1946. In Equity.

S. R. Wagg, Plaintiff in Error,

*vs.*

Mary B. Herbert, Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gertrude M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a Corporation), Evie P. Gillbert, Jas. W. Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a Corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, Frank Porter, Noah A. Miller, A. R. Andrean, and Irene Lanning, Defendants in Error.

*Supersedeas Bond on Appeal.*

Know all men by these presents,

That we S. R. Wagg as principal and O. M. Lancaster, C. E. Vandervoort and L. M. Drown as surities are held and firmly bound unto the above named defendants in error in the full and just sum of Seven Thousand Five Hundred Dollars ($7500) to be paid to the said defendants in error their heirs, successors, executors, administrators or assigns, to which payment well and truly — be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

The condition of this obligation is such that Whereas, on the 12th day of October, 1907, in the above entitled action then depending in said court between the said S. R. Wagg as plaintiff in error and the said above named defendants in error judgement and decree was rendered against the said S. R. Wagg plaintiff in error and the said S. R. Wagg plaintiff in error has obtained allowance of appeal of the said court to reverse the said judgement 41 and decree in the aforesaid suit and a citation directed to the said defendants in error citing and admonishing them to be and appear in the Supreme Court of the United States at the City of Washington, D. C., thirty days from and after the date of said citation.

Now therefore, if the said S. R. Wagg shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 28th day of October, 1907.

S. R. WAGG.
By A. J. BIDDISON, *His Att'y.*
O. M. LANCASTER.
L. M. DROWN.
C. E. VANDERVOORT.

UNITED STATES OF AMERICA,
*Western District Indian Territory, ss:*

O. M. Lancaster and L. M. Drown, each being duly sworn on his oath, says: That he is one of the Surities on the above bond; That he resides at Tulsa, Indian Territory: That he is worth over and above all his just debts, exemptions and liabilities a sum in excess of Ten Thousand Dollars.

O. M. LANCASTER.
L. M. DROWN.

Subscribed and sworn to before me this 26 day of October, 1907.

[SEAL.] L. K. CONE,
*Notary Public.*

My Commission expires Aug. 24, 1911.

TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

C. E. Vandervoort, of lawful age being duly sworn, on his oath says; That he resides at Pawnee, Okla.; That he is one of the surities on the above bond; that he is worth over and above his debts, exemptions and liabilities, a sum in excess of Fifteen Thousand Dollars.

C. E. VANDERVOORT.

Subscribed and sworn to before me this 26th day of October, 1907.

[SEAL.] J. H. STERLING,
*Notary Public.*

My Commission expires July 16, 1910.

This bond taken and approved by me this 28th day of October, 1907, and supersedeas granted thereon.

[SEAL.] B. F. BURWELL,
*Associate Justice of the Supreme Court*
*of the Territory of Oklahoma.*

42 [Endorsed:] No. —. Solomon R. Wagg, Plaintiff in Error, *vs.* Mary B. Herbert, *et el.*, Defendant- in Error. In the Supreme Court, sitting at Guthrie, Okla. Action in Equity. Supersedeas bond on Appeal. Filed Oct. 29, 1907. Benj. F. Hegler, Clerk Supreme Court. Poe, Biddison, Campbell & Eagleton, Tulsa, Oklahoma, Attorneys for Plaintiff in Error.

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43 In the Supreme Court of the Territory of Oklahoma.

No. 1946.

S. R. WAGG, Plaintiff in Error,

*vs.*

MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROOKSTOOL, WILLIAM A. ROOKSTOOL, EDNA D. ROOKSTOOL, GERTRUDE M. MARTIN, THE CHRISTIAN CHURCH, EFFIE S. GRIFFIN, •DICKERSON, GOODMAN, SMILEY LUMBER COMPANY, DAVID B. HOLLER, SAMUEL R. HULL, M. E. HULL, E. R. LANE, THOMAS H. WILLIAMS, THOMAS B. ANDREAN, JOHN B. MEYERS, C. I. GREEN, H. C. BERWICK, FIRST NATIONAL BANK OF CLEVELAND (a Corporation), EVIE P. GILBERT, JAS. W. EAGLIN, V. MAY EAGLIN, GRACE HAUNERKAPF, J. T. KIGGINS, GEORGE LEE, WILLIAM R. HOWELL, R. L. BURT, CHAS. E. FUNK, JOE S. ROGERS, S. R. KEELING, ANNIE BERWICK, KATE WYRICK, THE TRIANGLE BANK (a Corporation), DORA A. DUNCAN, GEORGE FARABEE, JOHN SEGAN, WILLIAM SMITHSON, JOSEPH ALDERSON, J. J. ALDERSON, THOMAS CLAWSON, J. S. SEWELL, S. R. DONGES, FRANK PORTER, NOAH A. MILLER, A. R. ANDREAN, and IRENE LANNING, Defendants in Error.

### *Petition in Error.*

The said S. R. Wagg, Plaintiff in error, complains of said Defendants in Error and alleges:

That the said Mary B. Herbert Defendant in Error, at the April 1905, term of the District Court in and for Pawnee County, Okla-

homa Territory, recovered a judgment by the consideration of said Court against *this* S. R. Wagg in a certain action then pending in said Court, wherein the said Mary B. Herbert was Plaintiff and *this* S. R. Wagg and Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gertrude M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (corporation) Effie P. Gilbert, Jas. W. Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank a corporation, Dora Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson,
44–50 J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges,
Frank Por*k*er, Noah A. Miller, A. R. Andrean, and Irene Manning were defendants.

The original case made, duly certified and attested, is hereto attached, marked "Exhibit A" and made a part of this Petition in Error; this Plaintiff in Error S. R. Wagg, avers there is error in the said record and proceedings in the following paticulars to wit:

1. The said Court erred in overruling the motion of Plaintiff in Error for a new trial.

2. Said Court erred in not rendering judgment for the Plaintiff in Error upon the pleadings in evidence.

3. Said Court erred in rendering judgment for Defendant in Error.

4. The court erred in admitting evidence offered on the part of defendant in Error, to the admission of which evidence this Plaintiff in Error at the time objected.

5. The Court erred in sustaining the objection of Defendant in Error to evidence offered by Plaintiff in Error, and which evidence was competent, relevant and material.

Wherefore, Plaintiff in Error prays, that said judgment so rendered may be reversed and set aside and held for naught, and that this Plaintiff in Error have judgment against the Defendant in Error upon the pleadings and evidence herein, but that if the Court should deem the said Defendant in Error, entitled to a new trial, then that such new trial be granted, and that this Plaintiff in Error be restored to all his rights that he has lost by the rendition of said judgment, and that this Plaintiff in Error have such other relief as to the Court may seem just, and that the rights of the other Defendants in Error, be not adversely determined but reserved to them.

BIDDISON & EAGLETON,
*Att'ys for Plaintiff in Error.*

Filed May 8, 1906.

BENJ. F. HEGLER,
*Clerk Supreme Court.*

51 In the District Court in and for Pawnee County, Oklahoma Territory.

W. H. HERBERT and MARY B. HERBERT, Plaintiff-,

*vs.*

S. R. WAGG, LEROY M. DROWN, JOHN P. ROOKSTOOL, WILLIAM A. ROOKSTOOL, EDNA D. ROOKSTOOL, GERTRUDE M. MARTIN, THE CHRISTIAN CHURCH, EFFIE S. GRIFFIN, DICKERSON, GOODMAN, SMILEY LUMBER COMPANY, DAVID B. HOLLER, SAMUEL R. HULL, M. E. HULL, E. R. LANE, THOMAS H. WILLIAMS, THOMAS B. ANDREAN, JOHN B. MEYERS, C. I. GREEN, H. C. BERWICK, FIRST NATIONAL BANK OF CLEVELAND (a Corporation), EVIE P. GILBERT, JAS. W. EAGLIN, V. MAY EAGLIN, GRACE HAUNERKAMPF, J. T. KIGGINS, GEORGE LEE, WILLIAM R. HOWELL, R. L. BURT, CHAS. E. FUNK, JOE S. ROGERS, S. R. KEELING, ANNIE BERWICK, KATE WYRICK, THE TRIANGLE BANK, a Corporation; DORA A. DUNCAN, GEORGE FARABEE, JOHN SEGAN, WILLIAM SMITHSON, JOSEPH ALDERSON, J. J. ALDERSON, THOMAS CLAWSON, J. S. SEWELL, S. R. DONGES, and FRANK PORTER, NOAH A. MILLER, A. D. ANDREAN, IRENE LANNING, Defendants.

Case-Made.

Be it remembered that on the 13th day of June, A. D. 1903, W. H. Herbert and Mary B. Herbert as plaintiffs, brought their certain action in the District Court of Pawnee County, Oklahoma Territory, by filing therein their petition, which is in words and figures as follows, to wit:

52 In the District Court of Pawnee County, Oklahoma Territory.

W. H. HERBERT and MARY B. HERBERT, Plaintiffs,

*vs.*

S. R. WAGG, LEROY M. DROWN, JOHN P. ROOKSTOOL, WILLIAM A. ROOKSTOOL, EDNA D. ROOKSTOOL, GERTRUDE M. MARTIN, THE CHRISTIAN CHURCH, EFFIE S. GRIFFIN, DICKERSON, GOODMAN, SMILEY LUMBER COMPANY, DAVID B. HOLLER, SAMUEL R. HULL, M. E. HULL, E. R. LANE, THOMAS H. WILLIAMS, THOMAS B. ANDREAN, JOHN B. MEYERS, C. I. GREEN, H. C. BERWICK, FIRST NATIONAL BANK OF CLEVELAND (a Corporation), EVIE P. GILBERT, JAS. W. EAGLIN, V. MAY EAGLIN, GRACE HAUNERKAMPF, J. T. KIGGINS, GEORGE LEE, WILLIAM R. HOWELL, R. L. BURT, CHAS. E. FUNK, JOE S. ROGERS, S. R. KEELING, ANNIE BERWICK, KATE WYRICK, THE TRIANGLE BANK (a Corporation), DORA A. DUNCAN, GEORGE FARABEE, JOHN SEGAN, WILLIAM SMITHSON, JOSEPH ALDERSON, J. J. ALDERSON, THOMAS CLAWSON, J. S. SEWELL, S. R. DONGES, and FRANK PORTER, NOAH A. MILLER, A. R. ANDREAN, IRENE LANNING, Defendants.

*Petition.*

Now comes the above named Plaintiffs and for cause of action, against the above named defendants allege:

That the above named Plaintiffs are, and at all times herein mentioned were, husband and wife, and living together as such.

That the above named plaintiffs are, and at all times mentioned herein were, residing upon the West Half of the Southeast Quarter of Section Eight (8) Township twenty-one (21) Range Eight (8) East of the I. M. in Pawnee County, Oklahoma Territory; that the above named Plaintiffs homesteaded the above described real estate under and by virtue of the laws of the United States and received their patent therefor, and at all times herein mentioned have resided upon and occupied the same as their homestead under the laws of the Territory of Oklahoma.

That upon the 26th day of Oct. 1898, the above named Plaintiffs borrowed from the above named Defendant S. R. Wagg, $900.00, and executed therefor a certain promissory note in the sum of One Thousand Dollars, a copy of which is hereto attached marked Exhibit "A" and made a part hereto; and to secure the payment of said note at the time executed their certain mortgage upon the
53 real estate above described, a copy of which is hereto attached, marked Exhibit "B" and made a part hereof; and as further security for the payment of said indebtedness signed their certain written instrument in the form of a warranty deed, a copy of which is hereto attached marked Exhibit "C" and made a part hereof; that said Exhibit "C" was then placed in the Bank of Cleveland to be by it held in accordance with the terms specified in a certain writing delivered by said Defendant S. R. Wagg to these plaintiffs as an inducement for the signing of said Exhibit "C" and containing the terms and conditions under which the said Exhibit "C" should be delivered to this Defendant S. R. Wagg. A copy of said writing is hereto attached marked Exhibit "D" and made a part hereof.

That in the negotiating of said loan of nine hundred dollars ($900.00) and the signing and delivering of the said several written instruments, attached hereto and marked Exhibits "A" "B" "C" and "D" and in the various transactions had between the said S. R. Wagg and these Plaintiffs as herein alleged, the Defendant Leroy M. Drown acted for and in behalf of the said Defendant S. R. Wagg as his agent with full authority in the premises to do all the things alleged herein to have been done, except the things done in person by the Defendant S. R. Wagg.

That thereafter and without the knowledge or consent of these Plaintiffs, and in violation of the Conditions expressed in said Exhibit "D" and in fraud of the right of these Plaintiffs in the premises the said Defendant S. R. Wagg wrongfully and fraudulently obtained possession of the said exhibit "C" on December 19, 1899, and caused the same to be placed on record in the office of the Register of Deeds in and for Pawnee County Oklahoma Territory and recorded in Book one of Deeds on page 329 and in the month of February 1900 notified these Plaintiffs that the said Deed was recorded and that these Plaintiffs no longer owned said lands, and that at
54 all times herein mentioned thereafter the said Defendant S. R. Wagg persistently continuously and wrongfully claimed

to these Plaintiffs that he was the absolute owner of said real estate without the right of redemption on behalf of these Plaintiffs and that the said wrongful contention on behalf of the said Defendant S. R. Wagg, so bore upon the mind of the Plaintiff W. H. Herbert that he went away temporarily in the hopes of by some means of securing means sufficient to make a tender to the said S. R. Wagg of the amount due him under the mortgage and to secure his rights in the premises; that during his absence the said S. R. Wagg came to the said premises and took possession by force, fraud, misrepresentation and deception of the major portion of the said premises and thereby deprived Plaintiffs of the enjoyment thereof and the means of the livelihood and of complying with their contracts referred to as Exhibits herein, which Plaintiffs could and would have done but for the wrongs above set forth. Plaintiffs further allege that although much inconvenienced they had another opportunity of securing money to pay the indebtedness represented in Exhibit "A" and offered and tendered back to the said S. R. Wagg the amount of the indebtedness represented in Exhibit "A" and a large amount, to wit: Several hundred dollars in excess thereof, and demanded a relinquishment of the claims of the said Defendant S. R. Wagg, which was refused, and these Plaintiffs were deprived of other opportunities of negotiating either for a loan or the sale of the said premises to other persons, by reason of the pretended claim of ownership by the said S. R. Wagg, which became more and more aggressive until, by the means of the wrongs, oppressions, over persuasions, deceit and fraud hereinabove set forth, and for a grossly inadequate
consideration, the said S. R. Wagg procured from this Mary
55 B. Herbert (in the temporary absence of her husband) a purported warranty deed to a portion of said real estate, a copy of which purported deed is hereto attached, marked "Exhibit E" and made a part hereof. And retained possession of that portion of said real estate described in said Exhibit "E" and abandoned possession of the remaining of said eighty acres of real estate.

That the only consideration received by these Plaintiffs, or either of them, for the said purported deed Exhibit "E" was a relinquishment of the said mortgage herein referred to as "Exhibit B" and that had it not been for the misconduct, wrongs, oppressions, fraud, and undue influence herein above set forth the said Deed referred to as Exhibit "E" would never — been executed, and the plaintiffs have an equitable estate therein, and are in equity the owners thereof and entitled to the possession thereof and that the defendants unlawfully keep them out of the possession of that portion described in said Exhibit "E."

That these Plaintiffs hereby tender into Court for the use and benefit of said Defendants herein the full consideration represented by the said note and mortgage, together with the interest and taxes according to the terms thereof. That the other above named Defendants have, or claim, some interest in the real estate involved herein, the exact nature of which is unknown to these Plaintiffs, but that the same is subordinate and inferior to the rights of these Plaintiffs herein.

Wherefore Plaintiffs prays judgment that the said Deed referred to herein as Exhibit "E" and the said Deed referred to herein as Exhibit "C" be cancelled and held for naught and that the Plaintiffs be given possession of all of said real estate and permitted to redeem the premises from the mortgage referred to herein as "Exhibit B" and that the Plaintiffs right, title and interest in the said premises be quieted and that all claims, or pretended claims, 56 made — any and all the Defendants herein be barred and held for naught, and for such other and further relief as may be equitable and just.

McGUIRE & CLARK,
*Att'ys for Plaintiff.*

Endorsed on the back as follows:

No. 1101, In the District Court of Pawnee County, Oklahoma Territory. W. H. Herbert and Mary B. Herbert, Plaintiffs, *vs.* S. R. Wagg, *et al.*, Defendants. Petition. Filed in the District Court, June 13th, 1903. Jay E. Pickard, by C. W. Bacon, Deputy.

57 And by causing thereon summons to be issued for said Defendants in the Petition named, and which Defendants were duly served with such summons.

And thereafter such other and further proceedings were had in said cause, that on the — day of —— 190–, the death of the Plaintiff W. H. Herbert occurred and was duly suggested and entered of record in said cause. And thereafter such other and further proceedings were had in said cause, that on the 28th day of November, 1904, the Plaintiff Mary B. Herbert, filed in said cause her amended Petition, which is in words and figures as follows, to wit:

58 In the District Court in and for Pawnee County, Oklahoma Territory.

MARY B. HERBERT, Plaintiff,
*vs.*
S. R. WAGG ET AL., Defendants.

*Amended Petition.*

Comes now the above named Plaintiff and having first obtained leave of the Court, files this Amended Petition setting forth her cause of action herein as to Defendant S. R. Wagg as follows and alleges:

That the above named plaintiff is and at all times herein mentioned was the owner of and residing upon the west half of the south east quarter section eight township twenty-one north range eight east of the I. M. in Pawnee County, Oklahoma Territory and has so resided at all times since the title thereto was acquired under the homestead laws of the United States; and by her husband who is now deceased and her two minor children.

That upon the 26th day of October, 1898, the above named Plaintiff with her husband W. H. Herbert, who is now deceased, borrowed from the above named Defendant S. R. Wagg, $900.00, and executed therefor a certain promissory note in the sum of $1000.00, a copy of which is hereto attached marked Exhibit "A", and made a part hereof. And to secure the payment of the said note to the said S. R. Wagg, executed their certain mortgage upon the real estate above described; a copy of which is attached thereto marked Exhibit "B" and made a part hereof. And as further security for the payment of said indebtedness, signed their certain instrument in the form of a warranty deed, a copy of which is hereto attached, marked Exhibit "C", and made a part hereof. Which said exhibit "C" was placed in the Bank of Cleveland to be by it held in accordance with the terms provided in a certain writing delivered by said Defendant S. R. Wagg to this Plaintiff and her said husband, who is now deceased, as an inducement for the signing of said 59 exhibit "C", and containing the terms and conditions under which the said Exhibit "C" should be delivered to the said defendant S. R. Wagg; a copy of which is hereto attached marked Exhibit "D" and made a part hereof.

That the negotiating of the said loan of $900.00 and the signing and delivering of the various written instruments attached thereto and marked exhibits "A" B, C, & D" and in the various transactions had between the said S. R. Wagg and this Plaintiff and her said husband as herein alleged, the defendant Leroy M. Drown, acted for and on behalf of the said Defendant S. R. Wagg, as his agent, with full authority in the premises to do all the things alleged herein to have been done, except the things done in person by the Defendant S. R. Wagg.

That in the drafting of the said mortgage and note, a mistake was made and does appear from the terms of the said exhibit "D" in this, that the interest after the first year was not due until the end of each year thereafter; and by mistake, was written due in advance. Which Plaintiff asks to have corrected and made to conform to the terms of the said Exhibit "D," if the Court should decide such to be necessary in order to construe the transaction in accordance with said Exhibit "D." This Plaintiff further alleges that on or about the 26th day of December, 1899, without the knowledge of either this Plaintiff or her said husband, and in violation of the conditions expressed in said Exhibit "D," and with the intent then and there to defraud; and in violation of the rights of this Plaintiff and in violation of the duties of the said S. R. Wagg in the premises and under the relationship existing between this said Plaintiff and her said husband and the said S. R. Wagg the said S. R. Wagg did obtain possession of the said exhibit "C" and on December 19, 1899, did cause the same to be of record in the office of the Register of Deeds in and for Pawnee County, O. T., 60 and recorded in book 1, of deeds on page 329. And the said S. R. Wagg did in the month of February 1900 notify this

Plaintiff and her said husband that the said Deed was recorded, and that this Plaintiff and her said husband no longer owned said land. And at all times thereafter did persistently and continually claim to this Plaintiff and her husband that he, the said S. R. Wagg was the absolute owner of said real estate, without the right of redemption, being in this Plaintiff and her said husband. And that the said S. R. Wagg on or about the 14, day of May, 1900, came to the said premises and took possession by force and over the objection and protest of this Plaintiff and in the absence of her said husband, and took possession of the major portion of said premises, and thereby deprived this Plaintiff and her said husband of the enjoyment thereof, the means of livelihood and of complying with their contracts, referred to as exhibits herein. Which could and would have been done with the proceeds therefrom. This Plaintiff offered to pay to the said S. R. Wagg the amount of the indebtedness represented in said Exhibit "A" and would have been able to have done so at the time; and would have been able to have complied with said offer, for a relinquishment of all the claims of the said Defendant S. R. Wagg to the said premises. But that said S. R. Wagg refused to accept the same, and attempted to exact from this Plaintiff several hundred dollars in excess thereof. And then refused to accept even that excess under a claim of having absolute title thereto; a wrongful and fraudulent claim; all of which became more and more aggressive by the said S. R. Wagg, until by reason thereof, and for a grossly inadequate consideration, and by taking an undue advantage of his relationship towards this Plaintiff under the contracts hereinbefore referred to, and the relationship and the position in which this Plaintiff and the said S. R. Wagg were placed, by reason of the wrongs of the said S. R. Wagg towards this Plaintiff and by
61 over persuasion, undue influence and for a grossly inadequate consideration, the said S. R. Wagg procured from this Plaintiff who was at the time inexperienced in transacting business and in the absence of her said husband, a purported warranty deed to a portion of said real estate, a copy of which is hereto attached marked exhibit "E" and made a part hereof. And has at all times thereafter retained possession of that portion of said real estate described in said Exhibit "A" and surrendered possession to this Plaintiff of only the remainder of said eighty (80) acres.

That the only consideration received by this said Plaintiff or her said husband for the said purported deed Exhibit "E", was a relinquishment of the possession of the remainder of said eighty (80) acres, covered by said mortgage herein, referred to as Exhibit "B" thereon, and that had it not been for the misconduct, wrongs, oppression, fraud, undue influence, and the taking advantage of the position occupied, by reason of the contracts referred to as exhibits hereto; and of the financially depressed condition of this Plaintiff by reason thereof, and of the wrongs purpetrated by the said S. R. Wagg hereinabove referred to; the said Deed referred to herein as exhibit "E" would never have been executed.

That this Plaintiff has an equitable estate in all the said eighty (80) acres, and is in equity the owner thereof, subject to the rights f S. R. Wagg as the mortgagee and is entitled to the possession hereof. And that the Defendants unlawfully keep Plaintiff out of he possession of that portion thereof described in exhibit "E."

That this Plaintiff hereby tenders and brings into Court for the se and benefit of the said Defendants herein the full consideration epresented by the said note and mortgage, together with the interest nd taxes according to the terms thereof, and stands ready and willing to pay the same on the order of the Court.

2 Plaintiff further alleges that on or about the first day of May 1900 the Defendant S. R. Wagg, took possession of all f said eighty (80) acres of land, excepting the house occupied by he Plaintiff and a small piece of ground on which said house was ocated, and the curtileges thereof, and that the Defendant has eld and kept from the Plaintiff the possession of said tract of and from that time to the present and caused the same to be kept rom the Plaintiff, and that the value of the use and occupation of aid land so held by the Defendant and retained from the Plaintiff as been and is the sum of $800.00.

Plaintiff further alleges that subsequent to the delivery by the 'laintiff to the Defendant S. R. Wagg, of the deed of which exhibit E" is a copy, the Defendant S. R. Wagg, made and executed a plat f the fifty-five (55) acres of land embraced in said deed, exhibit E," platting the same into lots, blocks, streets and alleys for town urposes, and named said plat Wagg's addition to the Town of 'leveland, Pawnee County, Oklahoma Territory, and did subseuently and before this action was brought, proceed to sell some of aid lots, to innocent purchasers, the exact number and amount reeived for which are not known to the Plaintiff, but which amount o a large sum of money, an- Plaintiff alleges that the Defendant . R. Wagg has not accounted to the Plaintiff for said moneys, ut has converted the same to his own use, and that an accounting s necessary between the Plaintiff and Defendant, to determine the mount which the Defendant has so unlawfully received and converted to his own use.

3 (The original petition stands as to these parties.)

Wherefore. Plaintiff prays judgment that the said Deed eferred to as Exhibit "E" be cancelled and held for naught and that t be adjudged and decreed by this court that the deed Exhibit "C" e held to be a part and parcel of the said mortgage Exhibit "B," and he court determine the amount due as principal and said mortgage rom the Plaintiff to the Defendant, and then that the Court proceed o determine the amount in crops, produce, rents, use and occupation vhich the defendant S. R. Wagg has taken or caused to be taken rom said eighty (80) acres of land, or any part thereof, and that he same be charged to the defendant and credited to the Plainiff, and that the Court after trial of the issues between this Plainiff and the other Defendants herein, also take an accounting and letermine the amount of money which the Defendant has received r should have received in money, notes and property for the sale or rade of lots to innocent purchasers without notice of the rights of this 'laintiff after the same shall have been determined by this Court under the issues formed between this Plaintiff and other defendants herein, upon the portion platted by him of said eighty (80) acres, that is of the said fifty-five (55) acres of land and that the same be charged to the Defendant S. R. Wagg, and that after the Defendant S. R. Wagg is given credit for the balance due on said note and mortgage and taxes, that the Plaintiff be given judgment against the said S. R. Wagg for the balance due the Plaintiff.

And the Plaintiff further prays judgment that she be restored to the possession of all the remainder of said land, and the Defendant S. R. Wagg and all persons holding by, through or under him since the commencement of this suit be ejected therefrom, and that the Plaintiff's title to all the said land, and each and every part thereof be quieted against the Defendant S. R. Wagg, and all persons
64 holding by, through or under him, and against all the Defendants herein and their alleged transferees and that all claims or pre-ended claims made by any of the Defendants be barred and held for naught, and that the Plaintiff be granted such other and further relief as the Court may deem legal and equitable, and that Plaintiff recover the costs in this action.

McGUIRE & CLARK AND
A. G. C. BIERER,
*Attorneys for Plaintiff.*

Consent is hereby given to the filing of this Petition as of within the time allowed by the Court.

BIDDISON & EAGLETON,
*Attorneys for Defendant S. R. Wagg.*

Endorsed on back as follows:

Case No. 1101. Mary B. Herbert, Plaintiff, *vs.* S. R. Wagg, *et al.*, Defendants. Amended Petition. Filed in the District Court Nov. 28, 1904. Jay E. Pickard, Clerk, by C. W. Bacon, Deputy. McGuire & Clark, Attorneys, Pawnee, Oklahoma.

65 And thereafter such other and further proceedings were had in said cause, that under leave of the Court duly had and obtained, the plaintiff Mary B. Herbert did on the 14th day of January 1905, file in said cause her second amended petition, which is in words and figures as follows, to wit.

In the District Court of Pawnee County, Oklahoma Territory.

W. H. Herbert and Mary B. Herbert, Plaintiffs,

*vs.*

R. Wagg, Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gertrude M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Myers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a corporation), Evie P. Gilbert, Jas. W. Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, and Frank Porter, Noah A. Miller, A. R. Andrean, Irene Lanning, Defendants.

### *Second Amended Petition.*

Comes now the above named Plaintiff and having first obtained
ave of the court, files this her second amended Petition and for
r cause of action against the Defendants herein alleges:

That the above named Plaintiff is and at all times mentioned
rein was the owner of and residing upon the west-one-half of the
uth East Quarter of Section Eight, Township Twenty-one North
Range Eight east of the I. M. in Pawnee County, Oklahoma Ter-
ory; and has so resided with her husband until his decease, and
th her two minor children at all times since the title thereto was
quired under the homestead laws of the United States as a home,
d claiming the same as a home under and by virtue of the laws
the United States and of the Homestead laws of the Territory of
klahoma.

That upon the 26th day of October 1898, the above named
aintiff with her husband, W. H. Herbert, who is now deceased.
rrowed from the above named Defendant S. R. Wagg $900.00 and
ecuted therefor a certain promissory note in the sum of $1000.00,
a copy of which is hereto attached marked Exhibit "A" and
made a part hereof. And to secure the payment of said
note to the said S. R. Wagg, executed their certain mortgage
on the real estate above described, a copy of which is attached
ereto marked Exhibit "B" and made a part hereof. And as fur-
er security for the payment of said indebtedness signed their
rtain instrument in the form of a warranty deed, a copy of which
hereto attached marked Exhibit "C" and made a part hereof, and
aced said Exhibit "C" in the Bank of Cleveland, to be by it held
accordance with the terms expressed in a certain writing, deliv-

ered by said Defendant, S. R. Wagg to this Plaintiff and her said husband, as an inducement for the signing of said Exhibit "C" and containing the terms and conditions under which the said Exhibit "C" was signed and the conditions under which it should be delivered to the said Defendant, S. R. Wagg, a copy of which is hereto attached marked Exhibit "D" and made a part hereof.

That in the taking possession of said Exhibit "D" and the said real estate, and in the negotiations looking to the redemption of said real estate from the said mortgage as embraced in all of said Exhibits "A" "B" "C" and "D" all as herein alleged; the said Leroy M. Drown acted with, for and in behalf of the said Defendant S. R. Wagg as his agent with full authority as such agent, and did in his capacity as such agent help, aid and abet the said S. R. Wagg in the doing of the various things herein alleged to have been wrongfully done by the said S. R. Wagg.

This plaintiff further alleges that on or about the 26th day of December, 1899, without the knowledge or consent of either this Plaintiff or her said husband, and in violation of the conditions expressed in said Exhibit "D", and to defraud and wrong this Plaintiff and her said husband, and in violation of their rights in the premises, and in violation of the duties of said S. R. Wagg in
the premises under the relationship existing between this said
68 Plaintiff and her husband and the said S. R. Wagg and said
S. R. Wagg did obtain possession of the said Exhibit "C" and on December 26th, 1899, did cause the same to be placed of record in the office of the Register of Deeds in and for Pawnee County, Oklahoma Territory, and recorded in book one of deeds at page 329; and thereby in particular did violate the conditions expressed in Exhibit "D" in this to wit: That the said deed was not under any circumstances to be delivered to the said S. R. Wagg until two years and a half after the date thereof, which time had not expired at the time of the taking of the same by the said S. R. Wagg. And thereby in particular did violate the rights of this Plaintiff in this: That the said Deed and said Exhibit "D" were but parts of the mortgage transaction and conveyed no title. And that the said S. R. Wagg obtained possession of the same for the unlawful purpose of, and did use the same for the unlawful purpose of setting up and claiming title thereunder adverse to this said Plaintiff and her said husband, and did take possession by force and fraud of said real estate as herein alleged, and did thereby oppress this Plaintiff and by said means fraudulently, wrongfully and by the use of said undue advantage, and the taking advantage of the conditions of this Plaintiff, and of the position which he occupied by reason of the relations existing as hereinbefore alleged at a time when this Plaintiff was financially embarrassed by reason of the facts herein alleged; and by reason of the financial embarrassment of this Plaintiff, and in pursuance of the advantage of said S. R. Wagg and the disadvantage of this plaintiff, said S. R. Wagg did in the month of February, 1900 notify this plaintiff and her said husband that the said deed was recorded, and that this plaintiff and her said hus-

band, no longer owned said land, and that at all times thereafter did persistently, wrongfully and continually claim to this Plaintiff and her said husband, and to the public, that he the said S. R. Wagg was the absolute owner of said real estate without the
69 right of redemption being in this Plaintiff and her said husband, And in furtherance thereof, the said S. R. Wagg did on or about the 14th day of May, 1900 come to the said premises and take possession by force and over the objection and protest of this Plaintiff, and in the absence of her said husband, of the major portion of said premises, and thereby deprived this said Plaintiff and her family of the enjoyment thereof, the means of livelihood and of complying with the contracts referred to as Exhibits herein; which could and would have been done with the rents and profits thereof.

And upon this Plaintiff soliciting permission to redeem from said mortgage, the said S. R. Wagg refused to accept from this Plaintiff the amount due upon the said note and mortgage, and attempted to exact from this Plaintiff the sum of $400.00 in excess of what was due on said mortgage according to the terms thereof, and before the time when said S. R. Wagg would have been authorized to take possession of said exhibit "E" And in furtherance of his said design to wrong and defraud the said S. R. Wagg refused to accept even the said excess of $400.00, under the fraudulent, wrongful and oppressive and unjust claim of him the said S. R. Wagg, being the absolute owner thereof, and by reason of the said fraud, oppression and over persuasion, undue influence and taking advantage of his position and the relationship of parties as herein set forth, and the disadvantage under which this Plaintiff was placed by reason of the acts herein complained of, the said S. R. Wagg for a grossly inadequate consideration procure from this Plaintiff who was at the time inexperienced in transacting business, and during the absence of her said husband, a purported warranty deed to all of said real estate, a copy of which deed is hereto attached, marked Exhibit "E" and made a part hereof. As a consideration therefore the said S. R. Wagg did give a deed to this Plaintiff to twenty-five acres
70 of said real estate, which was at the time this Plaintiff's own property, a copy of which deed is hereto attached, marked Exhibit "F", and made a part hereof.

That the only consideration received by this Plaintiff for the said purported deed marked Exhibit "E" was a relinquishment of the said mortgage herein referred to as Exhibit "B" and ever since which time the said Defendant S. R. Wagg and his assigns has retained and held the possession to the north 55 acres of said real estate, which is not included in Exhibit "F", the same being, substantially the same portion of said real estate which said S. R. Wagg by force and violence took and at all times thereafter has held from the possession of this Plaintiff as hereinbefore alleged, on or about the 14th day of May, 1900, and since which time the said S. R. Wagg has had, received and retained the rents and profits thereof. And for the purpose of further clouding said transaction had said Exhibit "C" again recorded on May the 6th 1901, in Book one page 581, in the office of the Register of Deeds of said County.

That the said real estate was at the time of the giving of said Exhibit "E" of the fair and reasonable value of $100.00 per acre. And that had it not been for the misconduct, wrongs, oppression, fraud, deceit, undue influence, over persuasion and the advantage of the position occupied by reason of the relationship of parties as herein set forth, and by reason of the financial depressed condition of this Plaintiff by reason thereof, the said Deed referred to herein as Exhibit "E" would never have been executed.

This plaintiff further alleges that the defendants herein, are by reason of the wrongs herein set forth, now in the actual possession of all of said eighty acres of land excepting the twenty-five acres referred to in said Exhibit "F." This Plaintiff further alleges that she has an Equitable estate in all of said eight acres and is in equity the owner thereof, subject to the rights of said S. R. Wagg as mortgagee, and is entitled to the immediate possession thereof, and that
71 the Defendants unlawfully keep this Plaintiff out of the possession of the North Fifty-five acres thereof, not included in said exhibit "F."

That this plaintiff hereby tenders and brings into Court for the use and benefit of said Defendants herein the full consideration represented by the said note and mortgage together with the interest and taxes according to the terms thereof, and stands ready and willing to pay the same on the order of the Court.

Plaintiff further alleges that on the 14th day of May, 1900, the Defendant S. R. Wagg took possession of all of said eighty acres of land excepting the house occupied by Plaintiff and a small piece of ground upon which said house was located and the curtileges thereof, and that the Defendant has held, kept and caused to be kept from this Plaintiff, the possession of said tract of land from that time until the present and that the value of the use and occupation of said land so held by the said Defendant and retained from Plaintiff has been and is the sum of $800.00.

Plaintiff further alleges that subsequent to the delivery by the Plaintiff to the defendant S. R. Wagg of the deed of which Exhibit "E" is a copy, the Defendant S. R. Wagg made and executed a plat of the fifty-five acres of land not embraced in said Exhibit "F," platting the same into lots, blocks, streets and alleys for town site purposes, and named the said plat Wagg's Addition to the Town of Cleveland, Pawnee County, Oklahoma Territory, and did subsequently and before this action was brought proceed to sell some of said lots, to innocent purchasers, the exact lots and amounts received for which are not known to the Plaintiff, but which amount to a large sum of money. And Plaintiff alleges that the Defendant S. R. Wagg has not accounted to the Plaintiff for said moneys, but has converted the same to his own use; and that an accounting is necessary between the said plaintiff and Defendant to determine the amount which the said Defendant has so unlawfully received and
72 converted to his own use.

That the Defendants herein other than the said S. R. Wagg laim to have some interest in the real estate involved herein adverse ) this Plaintiff, the exact nature of which is unknown to this Plainiff, but that the same is subordinate and inferior to the right of this laintiff herein.

Wherefore, Plaintiff prays judgment that the said Deed referred ) as Exhibit "E" be cancelled and held for naught; and that it be djudged and decreed by this Court, that the Deed referred to as Exhibit "C" be held to be a part and parcel of the said mortgage Exhibit "B." And that the Court determine the amount due as rincipal and interest on said mortgage from the Plaintiff to the )efendant. And that the Court proceed to determine the amount in rops, produce, rents, use and occupation which the said S. R. Wagg )efendant herein has taken or caused to be taken from this Plainiff and from said eighty acres of land or any part thereof; and that he same be charged to said S. R. Wagg and credited to this Plainiff.

And that the court after the trial of the issues between this Plainiff and the other Defendants herein also take an accounting and letermine the amount of money which the said S. R. Wagg has re-eived or should have received in money, notes and property for the sale or trade of lots to innocent purchasers without notice of the rights of this Plaintiff after the same shall have been determined by this Court under the issues formed or to be formed between Plaintiff and Defendants herein, upon the portion platted by him of the said eighty acres, that is to say of the fifty-five acres of land; and that the same be charged to the said S. R. Wagg defendant herein, and after the Defendant S. R. Wagg is given credit for the balance due on said note and mortgage and taxes, that this Plaintiff be
73 given judgment against the said S. R. Wagg for the balance due this Plaintiff on said account.

And this Plaintiff further prays judgment that she be restored to the possession of all the remainder of said land, and that the Defendant S. R. Wagg and all persons holding by, through or under him and against all the defendants herein and their alleged transferees, excepting such as shall by this Court be decreed to be innocent purchasers thereof in good faith and for a good and sufficient consideration. And that all other claims or pretended claims by any of the Defendants herein be barred and held for naught; and that this Plaintiff be granted such other and further relief as the Court may deem legal and just; and that this Plaintiff recover her costs in this action.

(Signed) McGUIRE & CLARK,
*Attorneys for Plaintiff.*

## EXHIBIT "A."

$1000.00 CLEVELAND, O. T., *Oct.* 24, 1898.

Five years without grace, after date, for value received, we as principals promise to pay to the order of S. R. Wagg, One Thousand and no-100 Dollars, at the Bank of Cleveland, and interest thereon at the rate of ten per cent. per annum from October 21, 1899, payable annually in advance and if not paid when due to bear ten per cent. interest from date. The makers and endorser severally waive presentment of this note for payment, and protest, and notice of non-payment, and agree that the time for payment of this note may be extended from time to time without notice and that no such extension shall impair or change the liability of any of these parties hereto. If suit be instituted we agree that Judgment be rendered for ten per cent., additional as attorney's fees.

(Signed) MARY B. HERBERT.
W. H. HERBERT.

74

## EXHIBIT "B."

No. 1793.

Mortgage from W. H. Herbert and Mary B. Herbert to S. R. Wagg.

Know all men, that on this 24th day of October, 1898, Mary B. Herbert and W. H. Herbert, husband and wife both of Cleveland, O. T., parties of the first part in consideration of ($1000.00) One Thousand Dollars, in hand paid by S. R. Wagg party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to said party of the second part, his heirs and assigns forever, the following real estate lying and being in the County of Pawnee, and Territory of Oklahoma, and known and described as follows to wit:

The same being the west half of the South East Quarter (S. E. ¼) of Section eight (8) in Township Twenty-one (21) North of Range Eight (8) East of the Indian Meridian the same being eighty acres of land adjacent to and adjoining the Town of Cleveland, O. T., For further description the farm is bounded on the north by Joe Box's farm, on the East by the Town of Cleveland, on the South by the Lowery Claim and on the west by C. J. Phenis farm.

"Appraisement is hereby waived in any foreclosure proceeding together with all the privileges and appurtenances to the same belonging.

To have and to hold the same to the said party of the second part his heirs and assigns forever, and the said Mary B. Herbert and W. H. Herbert, husband and wife party of the first part*y*, hereby covenant that they are well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple, and have good right and lawful authority to convey the same, and the title so conveyed is clear, free and unincumbered, and that they will warrant and forever defend the same to the party of the second part, his heirs and assigns against all claims whatsoever.

75 Provided always, and these presents are upon this express condition that if the said party of the first part, their heirs, executors and administrators, shall pay or cause to be paid to the said party of the second part, his heirs, executors, administrators or assigns, the just and full sum of one thousand dollars ($1000.00) five years from date hereof, with interest thereon from October 21st,

1899 until paid at the rate of ten per cent. per annum, the same to be paid annually in advance, and if the interest is not paid when due the same is to bear interest the same as the principal, according to the provisions of one promissory note, bearing even date herewith, executed by the said Mary B. Herbert and W. H. Herbert husband and wife, parties of the first part to the said party of the second part and shall moreover pay annually to the proper officers all taxes which shall be assessed on the said real estate and shall deliver or exhibit receipts therefor to the party of the second part his heirs and assigns on or before the first day of May next after such taxes shall have become due and payable; and shall insure and keep insured the buildings thereon against loss by fire in the sum of Two hundred dollars or over, in Insurance Companies to be approved by party of the second part, his heirs or assigns, and the policy or policies of such Insurance assigned as collateral hereto, and on the default thereof it shall be lawful for the said party of the second part his heirs or assigns to effect the insurance and the premium and premiums and other legal expenses, fees, costs and charges paid for the effecting of the same, together with interest thereon at the rate of ten per cent. per annum, shall be a lien upon the said mortgaged premises, added to the amount of the said one thousand dollars and secured by these presents until the payment of said promissory note, then these presents shall be null and void. But in the case of non-payment of any sum of money (either of principal, interest or taxes) at the time or times when the same shall become due, or to insure and keep 76 the policies assigned agreeably to the conditions of these presents or of the aforesaid note or of any part thereof, or in case of such failure to deliver such receipts, as above provided, or in case of failure on the part of said party of the first part to keep or perform any other agreement, stipulation or condition herein contained, then in such case the whole amount of said principal sum shall at the option of the said party of the second part, his representatives or assigns, be deemed to have become due and the same, with interest thereon at the rate aforesaid be collectable, in a suit at law, or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum shall have been made payable at the time when such failure shall occur as aforesaid; and it shall be lawful in such, for said party of the second part his heirs, executors, administrators or assigns, to grant, sell and convey said real estate with the appurtenances thereunto belonging, at public auction on vendue, and on such sale to make and execute to the purchaser or purchasers his, her or their assigns, forever, good and sufficient deed of conveyance in the law pursuant to the Statutes, in such cases made and provided; and out of the moneys raised from such sale to retain the principal and interest which shall then be due on the said promissory note together with the costs and charges rendering the surplus moneys if any there be, to the said party of the first part, their heirs or administrators, after deducting the costs of such vendue as aforesaid, and in the case of the foreclosure of this mortgage, the said party of the first — for themselves their representatives or assigns, do covenant and agree that they will pay the said party of the second part his representatives or assigns in addition to the taxable costs, in the foreclosure suit Sixty-dollars as solicitors fees.

In witness whereof the party of the first part have hereunto set their hand and seals this 24th day of October A. D. 1898.

77 MARY B. HERBERT.
W. H. HERBERT.

Signed sealed and delivered in the presence of
W. T. LITTON AND
G. W. SUTTON.

TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

On this 26th day of October A. D. 1898 personally came before me Mary B. Herbert and W. H. Herbert, known to me to be husband and wife, and to me known to be the persons who executed the foregoing mortgage upon land known to be the homestead of the grantors, and acknowledged that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

[SEAL.] W. T. LITTON,
*Notary Public.*

My Commission expires Jan. 30, 1899.

TERRITORY OF OKLAHOMA,
*County of Pawnee, ss:*

Received for record this 14th day of November A. D. 1898, at 8:05 P. M. and recorded in Vol. one (1) of mortgages on page 173. Fee $1.55.

[SEAL.] J. J. CORBUT,
*Register of Deeds.*

The original of this mortgage was accompanied by a plat of the land.

J. J. CORBUT,
*Register of Deeds.*

78 "C."

This deed is left in the bank of Cleveland in escrow as security of a note and mtg. given by Mary B. Herbert to S. R. Wagg of Appleton Wis. W. T. Litton Csh.

Know All Men by these presents that we, Mary B. Herbert, and her Husband W. H. Herbert, for and in consideration of the sum of One Thousand ($1000.00) Dollars do hereby sell and convey to S. R. Wagg the following real property situated in Pawnee County, South East Quarter of Section Eight (8) Township Twenty-one (21) North of Range Eight (8) East of the I. M. more particularly described and bounded as follows to wit:

On the North by the Joe Box place, on the East by the Town of Cleveland, on the South by the Lowery place, and on the west by the C. J. Phenis place, with all its appurtenances and warrant the title to same.

Signed and delivered this the 24th day of Nov. 1898.

MARY B. HERBERT.
W. H. HERBERT.

TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

Before me W. T. Litton, Notary Public in and for the above named County and Territory, on the 24th day of October, 1898, personally appeared Mary B. Herbert and husband and executed the above conveyance of land, to me known to be the homestead of the grantors and each for themselves acknowledged the execution thereof to be their free and voluntary act for the purposes named.

Witness my hand and official seal the date above written.

[SEAL.] W. T. LITTON,
*Notary Public.*

**My commission expires Jan. 30, 1899.**

79 This deed is given to be held in escrow as additional security to grantee for a loan of $1000.00 this day loaned to the grantors and for which they have this day given the grantee a mortgage on the same land.

Territory of Oklahoma.
Pawnee County, Cancelled.
Fee $1.00.

This instrument was filed 26th day of December 1899 at 8 A. M. and duly recorded in book 1 of deed, page 329.

T. M. BROADDUS.

"D."

SEPTEMBER 25, 1898.

W. H. Herbert, Cleveland, Oklahoma.

MY DEAR SIR: Yours of the 15th to hand and it's satisfactory as a fair declaration to do and I have begun to see something of the drift of things. If you was in Wisconsin I would not hesitate a moment. I have no love for such men as you describe, & I would not. I have been made to hesitate on acc't of the possible future contingencies. I wrote Mr. Drown about a deed held in escrow against the possible interference or injunction proceedings that scheming men and lawyers trump up. I will bring the matter to a focus at once and make the loan or quit & call it off. You execute a warrantee deed to me to be placed in escrow, and held by the Bank of Cleveland, of A. A. Drown, in trust, for the fulfillment of the terms of the mortgage. In case you fail to fulfill the terms and are in default of interest or other terms for six months; then the deed is to be delivered to me or my order. The mortgage is for $1000.00. I will deduct the first year's interest $100.00, send $900.00 to the

bank with instructions. This pays first year's interest, second year's interest is not due until the end of the second year and six months' grace on the end of this makes a full 2½ years before you allow, or I can ask for the deed in case of default of contract. I do this
80 solely in the interest of protecting myself against injunctional and interference proceedings from interlopers and blackmailers—in case such an unpleasant things as foreclosure proceedings should ever be necessary. I do not expect such a thing to occur; if I did no loan would be made, but I am now looking to the extreme of the case and its easiest protection for me. You can ask Mr. Drown how I deal with men. I never knowing distress a man, & am not inclined that way, but want contracts lived up to. The papers you executed have not arrived here as yet to my knowledge. They will be all right when complete and I have examined them, and all that will be necessary to execute the deed in connection with them and place them in hands of trustee as indicated above and for the purposes named. I trust this will meet your needs. On execution of papers you can have money. I shall be absent from home for ten days.

Yours, S. R. WAGG.

81 This indenture, made this 20th day of March, 1901 between Mary B. Herbert of Cleveland, Oklahoma Territory of the first part, and Solomon R. Wagg of Appleton, Wisconsin, of the second part.

Witnesseth, That said party of the first part, in consideration of the sum of One Thousand Dollars ($1000.00) Dollars to her in hand paid, the receipt whereof is hereby acknowledged, do so by these presents grant, bargain, sell and convey unto said party of the second part his heirs and assigns, all of the following described real estate, sitauted, lying and being in county of Pawnee and Territory of Oklahoma, to wit: The East one half (½) of the South West Quarter (¼) of Section Eight (8) Township Twenty-one (21) north of Range Eight (8) East, more particularly described and bounded as follows: On the North by the Joe Box place; on the East by the Town of Cleveland; on the South by the Lowery place and on the West by C. J. Phenis place.

To have and to hold the same, Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise -taining forever.

And said Mary B. Herbert for her heirs, executors or administrators, does hereby covenant, promise and agree to and with said party of the second part that at the delivery of these presents she is lawfully seized in her own right of an absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature and kind soever: and she will warrant and forever defend the same unto said party of the second part his heirs and assigns, against said party of the first part

her heirs and assigns, and all and every person or persons
82 whomsoever, lawfully claiming or to claim the same.

In witness whereof, The said party of the first part has hereunto set her hand the day and year first above written.

Miss HATTIE A. SNYDER. [SEAL.]
Mr. LEROY M. DROWN. . [SEAL.] MARY B. HERBERT

"E."

Endorsed on back as follows:

TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

Before me O. A. Gilbert, a notary public in and for said County and Territory, on this 28 day of May, 1901, personally appeared Mary B. Herbert and to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above set forth.

[SEAL.] O. A. GILBERT,
*Notary Public.*

My Commission expires May 14, 1904.

(Further endorsed:)
No. —. General Warranty Deed from Mary B. Herbert to Solomon R. Wagg. Territory of Oklahoma, Pawnee County, *ss.*

This instrument was filed in my office for record on the 31 day of May A. D. 1901 at 8 o'clock A. M. and duly recorded in book 4 on page 373.

Fees $—.
[SEAL.] T. M. BROADDUS,
*Register of Deeds.*

83 This indenture, Made this 21st day of March, 1901 between Solomon R. Wagg and Sarah M. Wagg, his wife of the City of Appleton State of Wisconsin of the first part, and Mary B. Herbert of Cleveland, O. T. of the second part,

Witnesseth, That said parties of the first part, in consideration of the sum of Two Hundred and Fifty Dollars ($250.00) to them in hand paid the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto said party of the second part her heirs and assigns, all of the following described real estate, situated, lying & being in Pawnee County and Territory of Oklahoma, to wit:

The South Twenty-five (25) acres of the West one half (½) of South East Quarter (¼) of Section Eight (8) Township Twenty-one (21) north of Range Eight (8) East, more particularly described and bounded as follows: On the East by the town of Cleveland; on the south by the Lowrey place; and on the west by C. J. Phenis place.

To have and to hold the same, Together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining forever.

And said parties of the first part for their heirs, executors or administrators, do hereby covenant, promise and agree to and with said party of the second part, that at the delivery of these presents they are lawfully seized in their own right of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature or kind soever; and they will warrant and forever defend the same 84 unto said party of the second part her heirs and assigns, against said parties of the first part their heirs, and all and every person or persons whomsover, lawfully claiming or to claim the same.

In witness whereof, The said parties of the first part have hereunto set their hands the day and year first above written.

SOLOMON R. WAGG.
SARAH M. WAGG.

"F."

Endorsed on the back as follows:

STATE OF WISCONSIN,
*Outagamie County, ss:*

Before me Orlanda E. Clark, in and for said County and Territory on this 21st day of March, 1901, personally appeared Solomon R. Wagg and Sarah M. Wagg to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the use and purposes therein set forth.

Witness my hand and official seal the day and year above written.

[SEAL.] ORLANDO E. CLARK,
*Notary Public.*

My commission expires 15 day of December, 1901.

(Further endorsed:)

Deed. General Warranty. No. — from Solomon R. Wagg and wife to Mary B. Herbert. Territory of Oklahoma, Pawnee County, *ss:*

This instrument was filed in my office for record on the 31 day of May, A. D. 1901 at 8 o'clock A. M. and duly recorded in
Book 4 on page 374.
Fees $—.
[SEAL.] T. M. BROADDUS, *Register.*

And thereafter such other and further proceedings were
had in said cause that on the 18th day of April, 1905, the
ndant S. R. Wagg, filed in said cause his separate Answer to
Second Amended Petition, and which said Separate Answer is
ords and figures as follows, to wit:

In the District Court of Pawnee County, Oklahoma Territory.

W. H. Herbert & Mary B. Herbert, Plaintiffs,

*vs.*

. Wagg, Leroy M. Drown, John P. Rookstool, William A.
ookstool, Edna D. Rookstool, Gertrude M. Martin, The
hristian Church, Effie S. Griffin, Dickerson, Goodman
miley Lumber Co., David B. Holler, Samuel R. Hull,
. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B.
ndrean, John B. Meyers, C. I. Green, H. C. Berwick, First
ational Bank of Cleveland (a Corporation), Evie P. Gil-
ert, Jas. Eaglin, V. May Eaglin, Grace Haunerkamf, J. T.
iggins, George Lee, William R. Howell, R. L. Burt, Chas.
. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate
yricks, The Triangle Bank (a Corporation), Dora A. Dun-
an, George Farabee, John Segan, William Smithson,
oseph Andrean, J. J. Anderson, Thomas Clawson, J. S.
ewell, S. R. Donges, Frank Porter, Noah A. Miller, C. R.
ndrean, and Irene Lanning, Defendants.

*Answer of S. R. Wagg.*

irst. Answering Plaintiffs' second amended Petition herein, the
endant S. R. Wagg denies each and every material allegation
rein, which is not herein explicitly admitted.

econd. This defendant admits the execution of each of the
tten instruments copies of which are attached to said second
ended Petition, and marked respectively "Exhibit A" "B" "C"
and "E" but this defendant denies that said Exhibit "D" con-
ns the terms and conditions of the escrow of the deed marked Ex-
it "C" and further denies that either of the endorsements as to the
rpose of the execution of exhibit "C" were endorsed thereon at the
e of the execution thereof or that they form any part of said instrument.

Third. This Defendant specially denies all that allegation
of said Second amended Petition, which reads as follows:
hat in the taking possession of said Exhibit "D" and the said real
ate in the negotiations looking to the redemption of said real estate
m the said mortgage as embraced in all of said exhibits "A" "B"
" and "D" all as herein alleged: that said Leroy M. Drown, acted
th, for and in behalf of the said Defendant S. R. Wagg, as his
ent with full authority as such agent, and did in his capacity as
ch agent help, aid and abet, the said S. R. Wagg in the doing of
rious things herein alleged to have been wrongfully done by the
id S. R. Wagg."

Fourth. This Defendant admits that subsequent to the delivery by the Plaintiff to the Defendant S. R. Wagg, of the Deed of which Exhibit "E" is a copy, the Defendant S. R. Wagg made and executed a plat of the fifty-five acres of land not embraced in said Exhibit "E" platting the same into lots, blocks, streets and alleys for townsite purposes, and named said plat Wagg's Addition to the Town of Cleveland, Pawnee County, Oklahoma Territory, and did subsequently and before this action was brought, proceed to sell some of these lots to innocent purchasers.

## II.

For a further and second defense to Plaintiffs' second amended Petition, This defendant alleges that all the admissions and denials of the first count are true, and they are hereby referred to and made a part of this defense as though herein fully set out.

This defendant further alleges that at the time he demanded and took from Escrow the warranty Deed, a copy whereof is attached to Plaintiffs' Petition, marked "Exhibit C", the said Plaintiff and 88 her husband W. H. Herbert, were in default of payment of the interest upon the loan secured by the mortgage, a copy whereof is attached to Plaintiffs' Petition marked Exhibit "B" in the sum of One Hundred Dollars, and in addition thereto were in default of the payment of taxes for the year 1898, and the land had been advertised for sale for the taxes of 1898, and this Defendant had been obliged to pay said taxes in the sum of $24.94 and accrued penalty and costs thereon in the sum of $3.86 in order to protect his aforesaid mortgage, and the said Plaintiffs were wholly unable and unwilling to refund and repay said taxes and penalty or to pay said interest. That for these reasons the said Defendant S. R. Wagg took the said Deed from escrow and filed the same for record as an additional security for said loan and additional advances, and after placing said deed of record this Defendant advised the said Plaintiffs that they might still redeem the said lands from the said deed and mortgage, and repeatedly requested them to do so, and advised them by letter and other wise that they might redeem said lands and that he would be willing to accept the payment of interest and additional advances and carry the loan according to its original terms, but said Plaintiffs at all times failed to pay any part of said indebtedness and advances, and in May 1900, at the request of the said Plaintiffs made through W. L. Eagleton then and there their agent and duly authorized in that behalf this Defendant extended the time for payment of said advances and interest until October 1900, upon the express agreement that this Defendant should have the Hay Crop growing upon said lands to put against and apply upon said advances, taxes, and interest. This defendant in the meantime having paid an additional year's taxes upon said property in the additional sum of $33.00 and penalty in the sum of $1.31. That in pursuance to said agreement, whereby said payments were extended until October 1900, this Defendant did take a portion of the Hay Crop from said 89 premises for the year 1900, and apply the same upon said advancements. Said Hay Crop was of the value of $20.00 and not more. This Defendant never at any time took possession of

y portion of said premises prior to the execution and delivery of
e said Deed Mentioned in plaintiffs' Petition and described therein
“Exhibit E”.

That after the expiration of the extension of time aforesaid, until
ctober 1900, the said Plaintiffs continually requested this Defend-
nt to further extend the time of payment and not foreclose upon
id premises and this Defendant during all said times was advising
e said Plaintiffs that they might redeem said lands from said in-
btedness and mortgage and deed, and that this defendant would
cept the payment of the entire indebtedness of the payment of the
lvances and accrued interest and continue the loan, but these
aintiffs were during all of said times unwilling to make any pay-
ents and were unwilling to keep up the taxes on said premises and
pay the same, as they were continually accruing, so that there has
crued as taxes for the year 1900, the sum of $26.34 with $1.36 as
lditional penalty thereon which this Defendant had paid in order
protect his aforesaid mortgage. In the mean time there had
crued as addition interest due upon the 24th day of October, 1900
e sum of one hundred dollars. No part of said original indebted-
ss evidenced by said note nor any of the interest had ever been
id, not had any of the aforesaid advances been refunded, and this
fendant had been to large expenses in protecting his aforesaid
terest and the lien of said mortgage so that in the winter of 1900-
901, and in the early spring of 1901, the Plaintiff in writing re-
uested this Defendant to consent to accept a portion of the said
nds in satisfaction of their aforesaid indebtedness to him. The
said plaintiffs being at said time fully advised and knowing
that the said mortgage and deed constituted but a mortgage
and lien upon said premises, for the aforesaid indebtedness.
his defendant at that time believed the said lands to be worth but
tle more than the amount due upon said indebtedness, and said
laintiffs offered to convey one half of said lands in satisfaction of
id indebtedness, but this Defendant was unwilling to accept the
me as he believed one half of the lands to be worth much less than
e amount of the indebtedness, but upon the repeated solicitation of
id Plaintiffs, this Defendant finally consented to settle the said
debtedness by taking a conveyance of said lands and re-conveying
enty-five acres of said tract to the Plaintiffs Mrs. Mary B. Herbert,
e said agreement being entered into by this Defendant at the
licitation of these Plaintiffs, and as an accommodation to Plaintiffs
save them *of* the expense of a foreclosure of said mortgage and
e entire loss of said lands, and in said agreement the said defend-
nt allowed for the said fifty-five acres retained by him, more than
value at that time and said transaction was entirely without op-
ession upon the part of this Defendant and without any undue
fluence upon the part of the Defendant. And in entire good faith
is Defendant cancelled the securities and all the indebtedness of
e said Plaintiffs to the said Defendant. Said agreement was exe-
ted and carried out by the necessary conveyances, copies of which
e attached to Plaintiffs' Petition, and marked respectively exhibits

"E & F", and that to induce this Defendant to execute said agreement and accept said conveyance, the Plaintiff Mary B. Herbert represented that she believed her husband to be dead, and that she had not heard from him for a long time and did not know of his whereabouts. Said conveyances were executed on the 28th day of May, 1901. That after the aforesaid settlement and after the execution of the aforesaid conveyance and up until the present time, the said Plaintiff Mary B. Herbert has resided upon the twenty-
91 five acres conveyed to her by said deed marked "Exhibit F"
and had had full notice and knowledge during all of said time of all the facts of this Defendant with reference to said lands, and has had full knowledge and notice of all the improvements constructed on said premises by other persons grantees of this Defendant herein after stated, and has during all of said time known of the platting of said lands and of the expenditure of large sums of money by Defendant in surveying, platting and improving said lands and never at any time prior to the bringing of this action, had she or any one in her behalf, or had either of the Plaintiffs ever expressed any dissatisfaction with the aforesaid settlement, but subsequent to the aforesaid settlement, the said Mary B. Herbert thanked this Defendant in writing for his kindness to her in making said settlement and accepting a portion of said lands in satisfaction of his said debt and had repeatedly expressed her pleasure and satisfaction with said settlement and did on the 6th day of July, 1901, agree in writing to procure the signature of the aforesaid W. H. Herbert, to the aforesaid conveyance marked "Exhibit E" in the event that the said W. H. Herbert should be alive, and which agreement is hereto attached marked "Exhibit A" and made a part hereof, and the said Mary B. Herbert thereby acquiesced and affirmed the aforesaid settlement and conveyance. Said agreement being executed for the purpose of quieting any question as to the title of said lands and to enable this Defendant to sell the same without question as to title. The question having been suggested that perhaps said Mary B. Herbert could not lawfully convey said lands unless joined in the deed by her husband.

That in reliance upon the aforesaid conveyance and the affirmance thereof and in good faith and fully believing that he had paid adequate and full consideration for the aforesaid fifty-five acres of said land, and that Plaintiff was fully satisfied therewith, this
92 Defendant took possession thereof, expended large sums of
money in improving the same and laying out and surveying and platting the same as an Addition to the Town of Cleveland, adjoining which said lands are located, and thereafter this Defendant sold large tracts and bodies of said lands to the other Defendants in this cause and to their grantors all of whom were purchasers for a valuable consideration and without notice of any claim of the said Mary B. Herbert, or either of the Plaintiffs herein.

That this Defendant is still the owner of all the said fifty-five acres of land not conveyed to purchasers in good faith or for a valuable consideration and without notice of any claim by the said

Plaintiffs or either of them adverse to this Defendant's fee simple title, that the Defendant paid all the taxes on said land for the year 1901, in the further sum of $33.14 together with 46¢ penalty. That Plaintiffs nor either of them, prior to the bringing of this action paid any taxes on said fifty five acres of said land, nor exercised any act of ownership over any part thereof after the execution of the aforesaid deed and mortgagee marked exhibit "E" and neither of them claimed at any time to be the owners of any portion of said tract prior to the bringing of this action; never at any time offered to reimburse this Defendant for any of the taxes which he had paid or laid out in that behalf or to pay him any of the original indebtedness or interest thereon, but claimed to exercise rights of ownership in the twenty-five acres by him conveyed to the said Mary B. Herbert free and clear of this Defendant's aforesaid deed and mortgage and did convey large tracts of the same by Deed of General Warranty to other and *bona fide* purchasers and did appropriate the proceeds thereof to their own use and benefit, said conveyance being made subsequent to Defendant's conveyance to Mary B. Herbert in the aforesaid final settlement, whereby the said Mary B. Herbert
affirmed the aforesaid settlement and conveyance in settle-
93 ment. During all the time after the aforesaid conveyance
marked Exhibit "E", this Defendant was continuously selling portions and tracts of said lands to innocent purchasers for value who were continually erecting extensive and valuable improvements upon said lands and improvements worth very much more than the lands upon which they were erected and very much more than the whole tract of land, all of which facts the said Mary B. Herbert was at all times cognizant of and in which she acquiesced and against which she never made protest or objection although during all the said time residing in plain view thereof and within a half mile thereof. That at the time of the settlement of this Plaintiff and Defendant and at the time of the execution of the conveyances marked Exhibits "E & F" the said lands was of little value, was adjoining the Town of Cleveland, Pawnee County, Oklahoma Territory aforesaid, and which said Town did little business, was without a railroad, was twenty-four miles from County seat, and had but small trading Territory tributary thereto and the commercial prospects for the said Town were not good and the prospects for the increase of said Town or the development of said Town were not good and the- had no immediate propspects of a railroad and the said Town was difficult of access. That by the platting of said lands and the surveying thereof and the laying the same out as an Addition to the Town, their value was materially increased, and that by the construction of Dwellings and Buildings thereon prior to the bringing of this action, their value was much more increased and that the Commercial outlook for the said town before the bringing of this action had become much brighter, the permanent survey of the Missouri, Kansas and Texas Railway was extended through the said Town upon the main line extending from Kansas City Missouri to Oklahoma City, Oklahoma and like wise the St. Louis and San

Francisco R. R. had definitely located its line of Railway to
94 join the said Missouri, Kansas & Texas Railway with the County Seat of said Pawnee County and a few miles distant from said Town, and the said lines of Railway were in actual course of construction, and since the institution of this action have been built and by reasons of the premises and for other reasons the value of the aforesaid property prior to the commencement of this action had increased (in value) to more than ten times its value at the time of the aforesaid conveyance; and since the commencement of this action it has increased in value many hundred times it value at the commencement of this action, and the Plaintiff herein Mary B. Herbert, having acquiesced in the aforesaid settlement and conveyance which were in all things fair, reasonable and just, and having permitted the expenditure by this Defendant of large sums of money in the improvements of the said lands and having slept upon her rights in the premises from the date of the execution of said Exhibit "E" until the commencement of this action, for a space of more than two years, and having confirmed the aforesaid settlement and conveyance by agreement to procure the signature of her aforesaid husband W. H. Herbert to the conveyance of this Defendant, and by conveying land free from the lien of this Defendant's mortgage, and which she did by virtue of said settlement, she is now estopped from asserting right, title interest, or equity in or to the said lands or any part thereof.

Wherefore, this Defendant prays that she take nothing by her action; that defendant recover his costs herein, and that said Plaintiff be forever barred of all right, title, interest or equity in or to said lands or any part thereof, and that she be enjoined from in any manner asserting the same, and that this Defendant's title in and to the above mentioned fifty-five acres of land be quieted as against all claims of the Plaintiff and any and all other persons claiming by, under or through her, and that this Defendant have such
95 other and further relief as is consistent with equity and good conscience.

(Signed) BIDDISON & EAGLETON.
*Att'ys for S. R. Wagg*

96 TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

A. J. Biddison of lawful age being duly sworn on his oath states: That he is attorney for the Defendant S. R. Wagg above named: That he knows the contents of the foregoing answer and that the denials in the third paragraph of the first count of said answer are true as this affiant is informed and verily believes, and that the reasons that this Defendant S. R. Wagg does not verify this answer is that the said S. R. Wagg is a non-resident of Oklahoma Territory and is absent therefrom.

A. J. BIDDISON.

Subscribed and sworn to before me this the 15th day of April, 1905.

[SEAL.]

HARRY E. PRAY,
*Notary Public.*

My commission expires on the 22, January, 1908.

97 EXHIBIT A.

TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

Mary B. Herbert being duly sworn on her oath deposes and says that she is a resident of said county; that she was deeded the sole owner of the following described premises, located within said County, and which was held by her as a homestead to wit: The west one half of the Southeast Quarter of Section eight, in Township twenty-one North Range eight E. I. M.; that the same was free and clear of any incumbrance whatsoever except a mortgage to S. R. Wagg of Appleton Wis. That at her request for a settlement of said mortgage, she has agreed to accept and has accepted in said land twenty-five acres, and has conveyed to said S. R. Wagg the balance thereof by deed in full satisfaction of said mortgage. That said deed was not signed by her husband W. H. Herbert for the following reasons: That she does not know where he is now, has not heard from him since November 1900 and believes him to be dead; that if he is not she agrees to procure his signature to said conveyance to said S. R. Wagg as soon as he shall return. It is mutually understood that this instrument is not to be recorded unless absolutely necessary in order to affect a sale of the above described fifty-five acres of said land conveyed by me to said S. R. Wagg, or circumstances arises which shall make necessary the recording of this instrument, in order to perfect the said S. R. Wagg's title to said land.

(Signed) MARY B. HERBERT.

Affirmed and subscribed to before me a Notary Public in and for the Territory and county above mentioned, this 6th day of July A. D. 1901.

[SEAL.]

L. M. DROWN,
*Notary Public.*

My Commission expires June 29th, 1905.

98 And thereafter such other and further proceedings were had in said cause that on the first day of May, A. D. 1905, the Plaintiff filed her reply to said answer of said S. R. Wagg, which reply is in words and figures as follows, to wit:

99 In the District Court of Pawnee County, Oklahoma Territory.

MARY B. HERBERT, Plaintiff,
*vs.*
S. R. WAGG ET AL., Defendants.

*Reply.*

Now comes the above named Plaintiff and for reply to the answer of the several Defendants herein alleges:

This Plaintiff denies each and every material allegation set forth in the several answers of the said Defendants, except such as are in Plaintiff's Petition herein specifically alleged.

(Signed) E. M. CLARK,
*Att'y for Plaintiff.*

Endorsed on back as follows: Case No. 1101. Mary B. Herbert, Plaintiff, *vs.* S. R. Wagg, *et al.* defendants. Reply to answers of several Defendants. Filed in the District Court May 1, 1905, Jay E. Pickard, Clerk, By C. W. Bacon, Deputy. McGuire & Clark, Att'ys at law. Pawnee, O. T.

100 And thereafter such other and further proceedings were had in said cause that on the 18th day of May A. D. 1905, the same came regularly on for trial before the Honorable John H. Burford, Judge of said Court without a Jury, and at such trial proceedings were as appears by the transcript of the stenographer's notes, which is in words and figures as follows, to wit:

101 In the District Court of Pawnee County, Oklahoma Territory.

W. H. HERBERT ET AL., Plaintiffs,
*vs.*
S. R. WAGG ET AL., Defendants.

*Stenographer's Transcript.*

Be it remembered, That on May 18, 1905, the same being a judicial day of the April, 1905, term of the District Court of Pawnee County, Oklahoma Territory, Honorable John H. Burford, presiding Judge, the above entitled cause came regularly on to be heard in its order. the plaintiff Mary B. Herbert appearing in person, and by Messrs. McGuire & Clark and Messrs. Dale & Bierer, and the defendants S. R. Wagg and L. M. Drown appearing in person and by Messrs. Biddison & Eagleton and Messrs. Wrightsman & Fulton, their attorneys, and the plaintiff's motion for a new trial having been overruled, thereupon the following proceedings were had and done, to wit:

102 MR. CLARK: There is one matter that I want to get a little information on, and that is both in the pleading and in the

statement of counsel for defendant. They deny that the terms of the escrow deed were those contained in the letter alleged in the plaintiff's petition. But they do allege that the deed was left in escrow under some kind of terms. It seems to me that if that matter could be cleared up, as to what their contention was, there could be no dispute down to the maturity of the first interest, and it seems to me that they ought to have alleged in their answer, in a case of this kind, what they claim the terms of that escrow were.

Mr. Biddison: We are not relying on that escrow for any purpose, if the court please, at all. We rely upon a settlement and a subsequent conveyance. We have no reliance upon it for any purpose in this action. So the terms are entirely immaterial to us. We have no objection, and counsel have examined the letters in the case and they ought to be advised fully as to what the terms are.

The Court: Well, call your witnesses for the plaintiff, and let's proceed to trial.

Mr. Clark: Now we desire, first, to offer in evidence that portion of the correspondence which has been furnished to us, to the consummation of the loan, and the putting up of the escrow deed, in order to get that part cleared up first.

Mr. Biddison: Let's have the instruments.

Mr. Clark: Now, these we have here, instruments that were introduced at the last term of the court, which, by stipulation, are agreed are the original instruments in the case. They are not in the order of their occurrence, and if counsel will take that, and permit me to use a copy, referring him to the dates, it would simplify the matter of presenting them.

103 Mr. Biddison: It is agreed that these might be used as though they were the originals, subject to objections for irrelevancy and immateriality.

Mr. Clark: Now, the first letter in the chain of this transaction, is one that has been furnished by counsel, under the demand made by us—— No, the first one is exhibit "M," copy book, page 9, of date June 18, 1898.

The Court: I don't know, but it seems to me that a great deal of this correspondence leading up to the first transaction would be immaterial for any question here, in view of the fact that you allege the borrowing of this money, the execution of the mortgage, and the making of the first deed, and placing it in escrow; and the terms of the mortgage itself, it seems to me, as a matter of law, would have to control as to its contents.

Mr. Clark: The terms of the escrow are the only question that, as I suggested a moment ago, that there was any controversy about.

The Court: Yes. They also allege the loan of this money, and the execution to them of the mortgage, and the making of the deed, and placing it in escrow; and they allege a default in the mortgage now, and that they afterwards settled the mortgage debt upon this second conveyance.

Mr Clark: The terms under which they were entitled to take that escrow deed, and their actions in taking that escrow deed, and the use they made of it thereafter, in violation of the original agreement, in order to place themselves in a better position for negotiating the second deed is, as we think, a material issue.

The COURT: Now the letters that you are offering, submit them——

104 Mr. CLARK: They are upon that point.

The COURT: Very well.

Mr. WRIGHTSMAN: What is the date of that letter, Mr. Clark?

Mr. CLARK: June 18, 1898. Letter to A. A. Drown by Mr. Wagg, concerning the making of this loan and escrow deed.

Mr. BIDDISON: Objected to as incompetent, irrelevant, and immaterial, for the reason that A. A. Drown is not, and never was the agent of this defendant, and never was alleged to be. A. A. Drown and Leroy M. Drown are two different parties.

Mr. CLARK: We are offering this as an admission of Mr. Wagg, and as an admission as to the terms of the escrow deed, and as a part of the correspondence leading up to the consummation of the transaction.

Mr. BIDDISON: We submit, Your Honor, as to the admission, prior to the transaction complained of, and to an outside party, cannot be complained of as having misled them in any way.

Judge DALE: But we will show that these parties had knowledge of all these, that they were shown these letters.

The COURT: It would be material, whether he made any statement in writing or orally. It would be a statement of his concerning the matter, and it would be competent evidence, any admission he has made about it. It could not be an admission of fact, but might be an admission of the transaction he was engaged in.

Mr. CLARK: His knowledge and understanding of the surroundings.

The COURT: Read the letter, and then I can tell something more about it; I can't until I hear it.

Thereupon Mr. Clark read said letter, the same being in words and figures, as follows, to wit:

105 "APPLETON, WIS., *June* 18, 1898.

A. A. Drown.

DEAR FRIEND: Yours at hand of the 14th and noted.

(Mr. CLARK: Now, that is one of the letters we called for, and haven't been able to get, the letter of the 14th. Now, there is a portion of this I don't care to read, unless they wish it. I will only read that which refers to this transaction.)

"I have not had time to confer with Mr. Clark on the question of securing and probating etc. but will advise you of any adverse findings. It is this. I am fast coming to the age when corporations want younger men and I have little time and no money to loan or get tangled up. The question is solely one of shall I get my money back, class of security and the business habits and character of the borrower and this I trust you to furnish me with, and not to loan to anyone of a questionable character or business habits.

On the first mentioned loan of $1000.00 you mention as security an 80 acre lot ½ of which has served as security for $1500.00 and on which is 2

I want this paid off so as to give me a first mortgage lien and if need be I will furnish the money to do it. I loan gold and want to be paid back in the same kind as I loan and make the note gold. If you can make the interest semi annual, do so.

A good way to save complications would be to give a deed straight out and out and I give back to borrower a bond for deed on payment of the note with interest and can have it for 5 years time at 10%. I have the money at hand now and no delay in advancing I want Clark (He refers to some attorney in Wisconsin, I presume) to pass on the correctness of the papers for I would not like doing anything without his approval on the same and at same time I want you to employ for me an honest disinterested man (lawyer) at that end who cannot be bought up. Your loan for Jan., 106 $2000.00 5 years I can take also more if you can get them on the right security. But want to learn more than half the value on anything.

Yours, S. B. WAGG.

Mr. **Clark**: The next letter that I wish to read is one written July 18, 1898, just one month later.

Mr. **Wrightsman**: Wait a minute. What do you want to do with that letter?

Mr. **Clark**: I offer it in evidence.

Mr. **Biddison**: To which we object, as incompetent, irrelevant and immaterial.

Mr. **Clark**: Under their admission that this is the correspondence.

Mr. **Biddison**: We don't object on the ground that it is not the correspondence, but we object as wholly immaterial, and has no reference to this land.

The **Court**: I think I will sustain the objection.

Judge **Dale**: Note an exception.

Mr. **Wrightsman**: I think, if the court please, they ought to put a witness on the stand and have him sworn, first, and prove the relations of the parties, and not merely try this case by virtue of supposed admissions.

Mr. **Clark**: Our idea of trying the case, if the court please, is to take the case up and try it as the transactions occurred.

The **Court**: Well, that is all right.

Judge **Dale**: I think this, Your Honor, that without question the speediest way to handle this is to presume, upon our statement, that this letter does refer to this particular piece of land. There are a whole lot of explanatory letters that show conclusively that it does.

107 The **Court**: Well, even conceding it does, it is a letter written to another party, prior to this transaction, and the question, as I understand it, is not questioned.

Judge **Dale**: The transaction is questioned all the way through, in this, to this extent: They have taken this mortgage. It is their contention in their answer that this property which they took was property which was hardly sufficient to satisfy their demands under their mortgage. Now, here is a letter from one of the parties——

Mr. CLARK: From the defendant himself.

Judge DALE: An admission that one half of that land had served as security for fifteen hundred dollars, and known to this man at that time, at the time he began his negotiations for the taking of this mortgage. Now, we expect to show by his own letters that, as time rolled on, the land became more valuable, and more valuable, and he knew it, and that he conceived the idea, as his letters will show further on, of making money out of this thing, outside of his mortgage. Now, there are a number of letters that I ran across yesterday, that show the transaction, and these letters are a part of the transaction, a part of the scheme, and should be offered in evidence, in my judgment, and considered by the court for whatever they are worth, in determining whether or not, as an ultimate proposition in this case, Mr. Wagg, and Mr. Drown, as his agent, undertook to, and did deliberately enter into a scheme to prevent this woman from selling this land to other parties, and compelling her to deed to them under pain and threat of foreclosure proceedings, a portion of this land, worth three or four times the amount they held against it under the mortgage. Here is the correspondence relating to these negotiations, and determining somewhat the value of this security, and the other letters will throw more light, as they go along.
108 It is the only way to get at it. We could put Mr. Wagg upon the stand, and show that he wrote this letter.

The COURT: That is not the question that they raise.

Judge DALE: And show that this letter was written with reference to this particular piece of land; that is the question raised by Mr. Wrightsman.

Mr. WRIGHTSMAN: No, I didn't raise that.

Mr. BIDDISON: I raised that question. I don't know what the fact is, and I don't want *to* court to assume a fact that I don't know what the fact is.

Judge DALE: The whole transaction will be thrown open to the court, and the court will understand the agency which existed upon the part of Mr. Drown, the admission of Mr. Wagg that he was turning the matter over to him; the scheme they had on hand before the second deed was issued; the platting of this for townsite purposes; all this is developed by these letters from Mr. Wagg to Mr. Drown. And those letters, I say let the court hear this correspondence between the parties with reference to this particular tract of land.

Mr. CLARK: It seems to me that if there is a statement made by them which we contend has reference to this particular land, even though they were to deny that it did, yet we would be entitled to submit that statement before the trial court, for him to determine whether or not it was that that did refer to this matter.

The COURT: Read the statement again.

Mr. CLARK: (Reading.) On the first mentioned loan of $1,000.00 you mention as security an 80 acre lot ½ of which has served as security for $1500.00 and on which is 2 —

I want this paid off so as to give me a first mortgage lien and if need be I will furnish the money to do it. I loan gold and want to be paid back in the same kind as I loan and make the note
109 gold. If you can make the interest semi annual, do so.

A good way to save complications would be to give a deed straight out and out and I give back to borrower a bond for deed on payment of the note with interest and can have *if* for 5 years' time at 10%. I have the money at hand now and no delay in advancing the same. Etc.

The Court: I don't see that that sustains the contention of counsel. He says he is told that half of it has answered for security for $1500.00, but he wants that paid off, and wants a first mortgage on the whole amount for his security. It is not an admission on his part that half of it would be good.

Mr. Clark: No, but it brings knowledge to his mind of its value, which, of course, we would have to show by other parties. But it shows that knowledge was brought to his mind, and to him, that it was worth that much.

The Court: I don't think that is any evidence of value, the fact that there has been a mortgage on it for fifteen hundred dollars.

Judge Dale: That is one of the best evidences on earth to a money loaner.

The Court: Oh, it might be, probably, if all the conditions were before the court. It might be that some fellow took it as a last resort.

Mr. Clark: It appears upon the face of the letter that it was a loan.

Judge Dale: That would call for an explanation from them.

The Court: If you are attempting to show value——

Judge Dale: We are not. We are simply attempting to show knowledge of the value to him. Those things are important all the was through. If not, they certainly can't hurt anything. If it is made competent before we get through——

The Court: If it is, I will admit it later. I don't think it is competent now.

110 Judge Dale: What is the ruling?

The Court: I say it will be excluded at this time. If it is made competent, it may be admitted later.

Judge Dale: Exception.

Mr. Clark: We next offer in evidence the letter written on July 18, 1898, to S. R. Wagg by A. A. Drown.

Mr. Wrightsman: We object to that as——

Mr. Clark: In response to the letter just offered.

Mr. Wrightsman: Of course the court cannot tell what it is until he hears it.

The Court: No. Read it.

Thereupon Mr. Clark read said letter, as follows:

"The Fair.

General Merchandise.

CLEVELAND, O. T., *July* 18, 1898.

Mr. W. R. Wagg, Appleton, Wis.

My DEAR SIR: Yours have been received and in part answered b Cashier Lytton and Roy.

Mr. Herbert got his abstract last week and you will find last ta receipt with valuation and taxes enclosed."

Mr. CLARK: Now, there is two things that we have demanded, an under the order of the court required, and yet they have not bee produced. The attention of the court—that the court may unde stand the importance of that part of the testimony, the contention that at that time, the taxes of 1898 were not paid, which taxes, th court will know, was a lien at least in July, 1898, and that this le ter shows that they had an abstract, and the last taxes paid, and y we are unable to produce it. They justify taking possession of th
escrow deed, because of the taxes referred to in that tax r
111 ceipt, as we understand it, and the abstract shows they wer
in fact paid.

The COURT: The record would show whether the taxes were pai

Mr. CLARK: There might be a mistake in the record. If the have a tax receipt, it ought to be produced. I will go back and rea it over.

"MY DEAR SIR: Yours have been received and in part answered l Cashier Lytton and Roy.

Mr. Herbert got his abstract last week, and you will find last ta receipt with valuation and taxes enclosed.

The town corporation Co. bought the eighty lying by the side this on which the town is located, of a man who paid $1200 for about four years ago. The same man has 400 acres all in sight this or within a mile for which he told me yesterday that he had standing offer of $25.00 in cash per acre.

I think that the land would satisfy you as security for the mone But would be glad for you to see it. There is not a plat of the tow to be had. I send you a form of mortgage which seems to be ve favorable to the lender.

The banks prefer to discourage outside loans and get their two p cent. as they are now doing——

Mr. Herbert is not in business except in some handling of lar tract of timber and coal land for a man in Kentucky.

It is safe enough for you to calculate that he is to make the mon out of his services with that land agency or out of sale of this la cut up into small lots and sold for village property.

We are well and doing well and send the kindest regards to y and the rest of the first class folks in town.

I held service twice here yesterday as it was Baptist day in t town.

Yours most truly, A. A. DROWN.

112 Mr. CLARK: We offer that letter in evidence, as to their knowledge of the value of that land at that time.

Mr. BIDDISON: We object to it as irrelevant and immaterial.

The COURT: It may be admitted in evidence. It is not very material, but probably competent.

Mr. BIDDISON: Exception.

Mr. CLARK: The next letter we offer is one from L. M. Drown, the son of A. A. Drown, who wrote the other to S. R. Wagg.

Thereupon Mr. Clark read the same as follows, to wit:

"CLEVELAND, OKLA., *July* 29, 1898.

Mr. W. R. Wagg, Appleton, Wis.

DEAR SIR AND FRIEND: In reply to yours of the 23rd inst. regarding Herbert's 80 acres, will say that I have had a talk with a man whom I consider the most conservative, cautious business man in Cleveland and a man of integrity.

He has been in business here over three years, and is as well acquainted with the country as anyone here. His name is C. A. Soderstrom. He says if this land were to be put up and sold at auction next week, it would undoubtedly bring $15.00 per acre, cash for its intrinsic value as farm land.

He says that a claim laying south of Herbert's farther from town, which has never been deeded from the Government sold within the last year at $14.37 to the acre at $2300 for 160 acres. Now Herbert's is undoubtedly much more valuable as he has his deed from Uncle Sam.

This man tells me that the Bank of Pawnee has loaned over $2000 on 120 acres of land laying north of town which is as good farming land but not as well located. I think these are as near rock bottom as you can get regarding that land. Regarding a lawyer, it 113 seems that W. L. Eagleton of Pawnee, Okla. is considered the best posted and most reliable man in this section.

Your draft came to hand all O. K. this evening. Thanks for your promptness. Those blank notes are all yours but I will get same from the bank tomorrow and send them to you. It is getting late and I must close. Will be more than pleased to be of any possible assistance to you down here. Let me know whenever I can serve you. With regards to all, I am,

Very sincerely, L. M. DROWN.

Mr. CLARK: We offer that letter in evidence.

Mr. BIDDISON: We object to the materiality and relevancy of the letters. It is simply an offer to show by interference what they *what they* don't have any direct evidence of.

The COURT: Well, it simply shows what information was conveyed to him at that time, and which he presumably acted upon. Objection overruled.

Mr. BIDDISON: I understand, if the court please, that this is the declaration of a man trying to get a loan for Mr. Herbert.

The COURT: I understand that. It is the information he had. If he had other information that he acted upon, it is competent to show it. Objection overruled.

Mr. **Biddison**: Exception.

Mr. **Clark**: We now offer in evidence letter from S. R. Wagg, written September 3, 1898.

The **Court**: To whom?

Mr. **Clark**: To one of the Drowns. It does not say.

Thereupon Mr. Clark reads said letter, as follows:

114 "Appleton, Wis., *Sept.* 3, 1898.

My Dear Mr. Drown: I enclose you letter from Mr. Mayo. It looks fair on its face and if Herbert got the money as stated, from Mayo and his friends why I want to know it.

I do not want to get drawn into any legal question at all. I shall not go over $1000.00 loan in any event, interest off in advance for 6 months. It is Herbert's business to clear matters up and not mine. I also enclose you Herbert's reply to my letters to him. 175 men with Mayo is quite a lot of them and at $50.00 each it is quite a sum if any besides Mayo claim it. Do not show these letters (but return to me after reading) except in strict confidence. Get at the facts and write me. If Mayo's object in writing me was to save me trouble and loss, I want to appreciate it properly by treating his letter with courtesy.

Yours truly, S. R. WAGG.

Mr. **Clerk**: We offer that letter in evidence.

Mr. **Biddison**: We object to it as incompetent, irrelevant and immaterial.

The **Court**: Objection overruled.

Mr. **Biddison**: Exception.

Mr. **Clark**: We now offer the letter of Mr. Herbert, referred to in the former letter.

Thereupon Mr. Clark read the same as follows, to wit:

"Cleveland, Okla. Ter., *Sept.* 12*th*, 1898.

Mr. S. R. Wagg.

Dear Sir: After going the round to Cleveland, Ohio, your letter reached me yesterday. Replying to it, I would say, That there is anything against my land is an absolute falsehood, other than what the abstract shows. How can this be? The Cashier of the
115 Bank of *Bank of* Cleveland tells me he wrote you regarding
the matter, he is truthful and a fair average of a man, whilst the other (Mayo) is a worthless vagabond. I don't care to go into details regarding him. You have the abstract of the register's office under his official seal that the land is clear except what it details and to relieve which I want the money. You have the word of Mr. A. A. Drown and his son Leroy whom we consider about the average for veracity, I refer you to Mr. W. L. Eagleton our Probate Judge. It does seem that the above is sufficient. I have no knowledge of your lawyer, but to confess he knows nothing of the laws of this land and its court proceedings and then pass judgment adverse to

facts, seem to say that he has a fair material in him to be a good ntier Judge if he cultivates it.

'exas is a large State and much of its land is worthless, it has dy people and a good land enough to make two states like Oklana and Wisconsin it has fair and liberal loan laws too long for ail. Arkansas is one of the richest states in the Union when the d is susceptible to cultivation it produces abundantly, the hills full of the very richest of mineral. The loan laws are of the worst kind for all concerned. I enclose you a recapitulation en of Gov. Barnes' report as taken from yesterday's Kansas City ly, which I will vouch for as being as near the truth as such cles usually get. You will make no mistake in letting your ney in this Territory. I assure you again on the word of a man ked by the very best evidence, that the land under discussion is r except what you know.

Yours truly,

W. H. HERBERT.
Sept. 12th, 1898.

Mr. Clark: We next offer in evidence letter of September 13, by Mr. Wagg to A. A. Drown.

nd thereupon Mr. Clark read the same, as follows:

Appleton, Wis., *Sept. 13th,* 1898.

. A. A. Drown, Cleveland, Okla.

Iy Dear Frie-d: Yours of the 10th just here. It reveals to me nature of the game and they want to make Herbert the victim. s a question whether they make me trouble later, of course I it the loan when safe or I would have thrown up the whole thing g ago except for my confidence in you and Roy's judgment in the tter. You understand such questions stop capital at once. I re- troubling you further in the matter but am waiting reply on McGee matter. You can explain to Mr. Herbert the situation I in. It is a question of clear title only. My present *mid* is to give 1 $1000.00 less one year's interest in advance; so you can tell him. ore a Jury a lender of money is an object of hatred to many, ecially in your section and one to be doomed—and they go for 1 every time, I do not want to be in that position. To avoid ex- sive foreclosure proceedings in case such a thing was necessary l to also prevent Mayo and his friends from getting at me thereby l running up costs, etc., I think a short and simple way is for erberts to execute to me a deed to be held in Escrow by the Bank Cleveland until the loan is paid and A. A. Drown as trustee or ething of that kind, unless it would interfere with his plans in e way not now known to me. Kindly place the matter before 1 for his consideration. My only object is to head off these fellows o are pursuing him, and cut them out from hurting me under circumstances. As I understand it H's deed from the government makes that a perfectly safe place to fall back to for title and absolutely secure.

With kind regards.

Very truly, S. R. WAGG.

Mr. CLARK: We next offer in evidence letter of September 15, 1898, by S. R. Wagg to W. H. Herbert.

Thereupon Mr. Clark read the same as follows, to wit:

"APPLETON, WIS., *Sept. 25th,* 1898.

W. H. Herbert, Cleveland, Okla.

MY DEAR SIR: Yours of the 15th at hand and is satisfactory as a fair declaration to do, and I have began to see something of the drift of things. If you was in Wisconsin I would not hesitate a moment. I have no love for such men as you described and would not. I have been made to hesitate on account of the possible future contingencies. I wrote Mr. Drown about a deed held in escrow against the possible interference or injunction proceedings that scheming men and lawyers trump up. I will bring the matter to a focus at once and make the loan or quit and call it off.

You execute a warrantee deed to me to be placed in escrow and held by the Bank of Cleveland or A. A. Drown in trust for the fulfillment of the terms of the mortgage in case you fail to fulfill the terms are in default of interest or other terms for 6 months; then the deed is to be delivered to me or my order. The mortgage is for $1000.00. I will deduct the first year's interest, $100, and send $900.00 to the bank with instructions. This pays one year's interest. The second year's interest is not due until the end of the second year and six months' grace on the end of this makes a full 2 & ½ years before you allow or I can ask for the deed in case of default or contract.

118 I do this solely in the interest of protecting myself against injunctional and interference proceedings from interlopers and blackmailers—in case such an unpleasant thing as foreclosure proceedings should ever be necessary. I do not expect such a thing will ever occur. If I did no loan would be made, but I am now looking to the extreme of the case, and its easiest protection for me. You can ask Mr. Drown how I deal with men. I never knowingly distress a man and am not inclined that way but want contracts lived up to.

The papers you executed have not arrived here as yet to my knowledge. They will be all right when completed and I have examined them and all that will be necessary is to execute the deed in connection with them and place in the hands of trustees as indicated above for the purposes named. I trust this will meet your views. On execution of papers you can have money.

S. R. WAGG.

Mr. CLARK: We next offer in evidence letter of September 30th, by S. R. Wagg, to the Bank of Cleveland.

Judge DALE: What year is that?

Mr. CLARK: September 30, 1898, fifteen days after the last letter read.

Thereupon Mr. Clark read the same as follows:

APPLETON, WIS., *Sept. 30th,* 1898.

Bank of Cleveland, Oklahoma.

GENTLEMEN: Referring to your letter of Sept. 9, 1898 on the Herbert loan; I enclose you $900.00 to perfect the loan after clearing title perfectly as stated you are willing to do and you are only allowed to pay any money until all liens are paid and the mortgage is recorded wrote and sent; and not until then. This apply money in payment of prior mortgages or liens and clear and perfect title to me as I am first lien and have the money ap-
119 plied as purchase money on the records in liquidating prior claims. There must be also attached to this mortgage the abstract of title under recorder's seal. Map references by name where 80 is located, *meets* and bounds inserted in the mortgage locating the land so you know it is the identical 80 near Mr. Drown's store, also register's Certificate that my mortgage is first lien the title having been cleared and now rests on my mortgage. You are instructed to consult with Mr. Eagleton, Pawnee my paid attorney in this matter; let this in no *was* effect you in carrying out instructions except to work harmoniously to protect my interests. You also to write me the strongest form of promissory note suitable to attach to the mortgage and payable to my order at your bank. I have also asked Mr. Drown to look over the papers and description of land and locate in my interest and to ask you to let him read this letter. A waiver Clause on foreclosure is also inserted in the mortgage, written on the Wisconsin form asking that you carefully protect my interests in the transaction and anything I have omitted to do to notify me before acting further. Charge Herbert for the work in getting ready the papers for delivery to me with clear title. For handling the money and paying him send the bill to me. I shall want you to collect interest when due with him and future loans.

All done pay balance to Herbert. Mrs. W. H. have witness to the note.

Yours truly, S. R. WAGG.

To Bank of Cleveland, Oklahoma: You hold the deed in escrow.

Mr. CLARK: Now, we have here something that was introduced at the last term of the court. I don't know how it got into the papers, or where it came from, but it was in as a part of the stipulation, and seems to have accompanied that letter of September
120 30, 1898, taken from copy book, page 974. I think that is where it came from.

Thereupon Mr. Clark read the same, as follows:

"*Order for Delivery of Deed.*

CLEVELAND, OKLAHOMA, *Sept. 30th,* 1898.

For value received, receipt of which is here acknowledged We. Mrs. and Mr. Herbert husband and wife executors of a certain Mortgage to S. R. Wagg of Appleton, Wis., have executed a warrantee deed carrying the land mentioned in the above mortgage; such deed to be held in escrow by the Bank of Cleveland in trust for the further protection of the mortgage as hereafter described.

It is agreed and understood that if the mortgagor is in default of interest for six months after the same is due and payable, the Bank of Cleveland is hereby authorized and instructed to deliver the aforesaid deed to S. R. Wagg or his order.

Witness my hand and seal this.

(Signed) MARY B. HERBERT,
W. H. HERBERT.

In the presence of,
——. ——.

Mr. CLARK: I will state, as I understand it, this was produced last term of court from that record. It has written on here in lead pencil—I don't understand that was ever signed by the Herberts, but whether it was or not, it bears the lead pencil inscription "Mary B. Herbert, W. H. Herbert." Its only production in this case has come from Mr. Wagg, which we submit is his understanding of the terms of the escrow.

Mr. BIDDISON: We object to it as irrelevant and immaterial, and simply a matter of negotiation, that never was concluded between the parties. There is no pretension that it was ever signed.

The COURT: The objection is overruled at present.

Mr. BIDDISON: Exception.

121 Mr. CLARK: We next offer in evidence a portion of a letter from Mr. A. A. Drown, to Mr. Wagg.

Thereupon Mr. Clark read the same as follows:

CLEVELAND, O. T., 10, 4, '98.

MY DEAR MR. WAGG: I do not know whether Mr. Herbert will take loan or not upon your conditions. If he does I will do all I can to see that the description of the mortgage covers the 80 acres upon which he lives, and that it is a first and perfect lien on same."

Mr. CLARK: Then there is some other correspondence, referring to other matters. And signed "A. A. Drown."

Mr. CLARK: I next offer in evidence letter from A. A. Drown to Mr. Wagg, bearing date October 11, 1898, and memorandum on the corner of the original: "Answered to send mortgage for examination. No. copy 10, 15, '98.

CLEVELAND, OKLA., 10, 11, 1898.

MY DEAR MR. WAGG: Yours came to day. I found Mr. Herbert waiting to see Eagleton. I think he will take the money all right."

Mr. CLARK: After referring to other matters, signed, "A. A. Drown."

Mr. CLARK: We next offer in evidence a letter of October 31, 1898, by S. R. Wagg to the Bank of Cleveland.

Thereupon Mr. Clark read the same as follows:

APPLETON, WIS. *Oct.* 31*st*, 1898.

Bank of Cleveland, Oklahoma.

GENTLEMEN: Will you expedite the completion of the Herbert loan sent you Sept. 30th as it seems ample time in the absence of an explanation the writer not doubting your diligence in the
122 matter. Please require Mr. Herbert to do so or return the money to me.

Yours truly, S. R. WAGG.

N, B.—This is not to be construed as cutting necessary time for you to carefully complete the papers but if such is needed explain how much time more is needed and why?"

Mr. CLARK: We next offer in evidence letter of November 8, 1898, written by S. R. Wagg to the Bank of Cleveland.

Thereupon Mr. Clark read the same as follows:

APPLETON, WIS., *Nov.* 8*th*, 1898.

Bank of Cleveland, Okla.

GENTLEMEN: You are herewith instructed to deduct your bill of $3.45 from the $900.00 sent you on account of Herbert loan and return balance *to* $896.55 to me, unless Mr. Herbert and wife at once properly execute the mortgage deed (warrantee) I sent you: and deposit a warrantee deed in escrow with you as trustee; further securing the loan; all as instructed in my prior letter, you to see a clear and full description of the land on limits and boundaries is inserted in mortgage fixing the identity of the land lived on together with an insurance on the house assigned as additional security; All former instruction not in accordance with the above is hereby withdrawn. Your action is requested with bill of services.

Yours truly, S. R. WAGG.

Judge DALE: The court will bear in mind that the letter just read puts the prior letters in force.

The COURT: Puts them in force?

Mr. DALE: Yes sir.

The COURT: It says they are withdrawn.

123 Judge DALE: Read that again.

Thereupon Mr. Clark re-read that portion of the letter.

Mr. BIDDISON: What is the date of that?

Mr. CLARK: That is November 8, 1898.

Mr. CLARK: We next offer in evidence letter of S. R. Wagg to W. H. Herbert and wife, written November 12, 1898, four days later.

Thereupon Mr. Clark read the same, as follows:

APPLETON, WIS., *Nov.* 12*th*, 1898.

W. H. Herbert & Wife, Cleveland, Oklahoma:

Mr. Drown states you consider that to give me a deed in escrow will in default of terms of contract operate as and be a sale of said land for the loan made.

Yes your understanding is correct. If you fail in any terms under which the loan is made, the land is mine.

Now we both understand and agree upon it.

Awaiting your action, I am,

Yours truly, S. R. WAGG.

Mr. CLARK: We next offer in evidence letter of December 3, 1898, by S. R. Wagg to the Bank of Cleveland.

Thereupon Mr. Clark read the same as follows:

APPLETON, WIS., *Dec.* 3, 1898.

Bank of Cleveland, Cleveland, Okla.

GENTLEMEN: The mortgage and papers came duly to hand and am pleased to note you consider them good security; with the deed of conveyance to me that you hold in escrow against default of contract, I hope Mr. Herbert and Mrs. Herbert will be able to
124 handle things to their advantage and keep up the contract.
I notice one thing, that the abstract showed mortgage released at 8:00 P. M. Nov. 14/98 before you and one John Towsley Mill Co., Ark. and S. R. Wagg's filed 8:05 P. M. same date. Were you and John Townsley both together at that time. Please advise me on that point.

I enclose you my check #145 for $8.25 as can't get draft to-day. Their New York correspondence is Chemical National Bank and will pass Clearing House all right. While my patience has been annoyed; allow me to thank you for the candid manner in which you have met my questions and appear to have protected my interests against security I would not touch at half price. It is what I call square dealing and just what I want and nothing less.

Yours truly, S. R. WAGG.

Mr. CLARK: We next offer in evidence letter from L. M. Drown to S. R. Wagg, written on October 25, 1899. Now, this refers—where I have read to this far, that is the correspondence to the consummation of the loan. If the court will pardon me, just a moment. While we are about it, we will submit the whole correspondence, and have it done.

Thereupon Mr. Clark read said letter, as follows:

CLEVELAND, O. T., *Octo.* 25, '99.

Mr. S. R. Wagg, Appleton, Wis.

DEAR SIR: The following is a report of the corn I have bought since rendering the last report.

For some reason Herbert failed to come up with his interest money yesterday. I saw him this morning and asked him about it and he said he had been looking for the money every day for the last two weeks but it had failed to come. He says he has a copy of a
125 letter which he wishes me to mail you and I told him to bring it and I would mail it. He says the money will be here sure inside of ten days. He says if it don't come he will sell the place in order to pay it."

Mr. **Clark**: After referring to other matters, signed L. M. Drown.

Mr. **Clark**: We offer in evidence letter written October 25, 1899, the same day, by W. H. Herbert to S. R. Wagg.

Thereupon Mr. Clark read the same as follows, to wit:

Cleveland, O. T., *Oct.* 25, 1899.

Mr. S. R. Wagg.

My Dear Sir: I received an order from you to pay Mr. L. M. Drown $100.00 due, as interest, by the terms of your last letter to me, I have been led to suppose I had considerable time yet, and it caught me by surprise. I can usually furnish $100.00 at short notice.

The deal from which I can spare the money will not be consummated for two weeks. I ask extension for that time. I send you copy of the letter that I have been governed by, and which I presume has misled me.

Letter from you, after some preliminaries you write, the mortgage is for $1000.00. I will deduct the first year's interest $100.00 send $900.00 to the Bank with instructions. This pays first year's interest. The second year's interest is not due until the end of the second year, and six months' grace on the end of this makes a full two and one-half years before you allow, or I can ask for the deed in case of default of contract.

This is a copy of your letter that I have been governed by and it seems it has misled me.

I am,

Very truly yours, W. H. HERBERT.

126 Mr. Clark: We next offer in evidence letter written October 28, 1899, three days later, by L. M. Drown, to S. R. Wagg.

Thereupon Mr. Clark read the same, as follows:

"Cleveland, O. T., *Oct.* 28, 1899.

Mr. S. R. Wagg, Appleton, Wis.

Dear Sir: I enclose herewith letter from Mr. Herbert relative to the interest due you which you can take up with Mr. Herbert.

He tells me he will be sure and have the money inside of two weeks. Of course that is something we can tell more about at the end of the two weeks. However, I will not be surprised if he gets the money as I saw a rather favorable letter from one of the men he is expecting to get the money from.

Yours truly, L. M. DROWN.

Mr. Clark: We next offer in evidence letter of November 1, 1899, by S. R. Wagg to W. H. Herbert.

Thereupon Mr. Clark read the same as follows:

Appleton, Wis., *Nov.* 1*st,* 1899.

W. H. Herbert, Cleveland, Okla.

My Dear Sir: Your letter of recent date at hand, and noted. We had considerable correspondence prior to the mortgage contract.

When the contract is completed and signed that is the agreement. It would be convenient to have the money to use; but if you are hard pressed for money I shall not think of distressing you, for about all I want is security that is safe and does not warry me. When you get it pay Mr. Drown with deferred interest and get the
127 receipt sent. With best wishes,

Yours truly, S. R. WAGG.

Mr. Clark: We next offer in evidence letter written November 13, 1899, by S. R. Wagg to L. M. Drown, using his first name, as "My dear Roy".

Thereupon Mr. Clark read the same, as follows, to wit:

Appleton, Wis., *November* 13, 1899.

My Dear Roy,
Cleveland, Oklahoma:

Your telegram received about 5 P. M. I wired reply to pay taxes, money by the next mail. While I do not think it necessary I enclose you power of attorney on the whole mortgage matter. I am astonished that Herbert should allow taxes to lapse and land sold at auction and never say a word to me, when I was waiting on interest. I will also notify county treasurer. You are authorized to pay taxes for me as mortgagee. Now I hold Litten's receipt for the deed held in escrow. You demand the deed and place on record. I feel outraged by such conduct on Herbert's part, and as taxes and interest both lapse it shows his principles and ability. I want the least possible truck with him, and we will cut short the matter. Record deed at once and forward to register of deeds by registered mail. Take no chances and trust no one, tell no one anything until all is fixed. Herbert may say he has letters saying I was to give him time after lapse of interest, there was something said of that kind in four or five letters, none of which he has acknowledged or accepted, and all there is is the mortgage, that's the agreement and contract and he must live up to it and it has the Waiver Clause, too.

Mr. Eagleton is my retained and paid attorney, if necessary see him remembering he is also Herbert's attorney. Be on
128 guard and use your judgment. If you think he is not favorable to me, and see another attorney.

S. R. WAGG.

Mr. Clark: I want to say to the court that that telegram is one of the things we have demanded, and which has not been produced, "I have your telegram received about 5 p. m."

Mr. Biddison: That telegram was left here last term of court, Mr. Clark. I don't know what has become of it. We have not got it.

Mr. Clark: If the stenographer's notes will show it was here, then it undoubtedly was. I have no knowledge of ever seeing it. "November 13, 1899. My dear Roy, Cleveland, Okla. Your telegram received about 5 p. m., I wired reply to pay taxes money by the next mail. While I do not think it necessary I enclose you power of attorney on the whole mortgage matter." Now, I desire to say that that power of attorney we never secured.

The COURT: Was it recorded?

Mr. CLARK: No sir. "I am astonished that Herbert should allow taxes to lapse and land sold at auction and never say a word to me, when I was awaiting on interest. I will also notify County Treasurer you are authorized to pay taxes for me as mortgagee. Now I hold Litten's receipt for the deed held in escrow." That is another document which we demanded, and which has not been furnished. "You demand the deed and place en record. I feel outraged by such conduct on Herbert's part and as taxes and interest both lapse, it shows his principles and ability? I want the least possible truck with him and we will cut short the matter. Record deed at once and forward to Register of Deeds by Registered Mail. Take no chances and trust no one tell no one anything until all is fixed. Herbert may say he has letters saying I was to give him time after lapse of interest, there was something said of that kind in four or five letters none of which he has acknowledged or accepted
129 and all there is is the mortgage, that's the agreement and
contract and he must live up to it and it has the Waiver Clause too.

Mr. Eagleton is my retained and paid attorney, if necessary see him remembering he is also Herbert's attorney. Be on guard and use your judgment if you think he is not favorable to me and see another attorney.

S. R. WAGG."

Mr. CLARK: We next offer in evidence letter written by S. R. Wagg to the County Treasurer of Pawnee County, Oklahoma Territory, of the same date, November 13, 1899.

Thereupon Mr. Clark read the same, as follows, to wit:

NOV. 13TH, 1899.

County Treasurer Pawnee County, Pawnee, Oklahoma, I. T.

MY DEAR SIR: This is to notify you that I hold the first mortgage on Mary B. Herbert's 80 acres in Cleveland, Oklahoma, 8.5. and signed by Mary B. Herbert and her husband W. H. Herbert same 1 place.

I am today advised the taxes are unpaid and the land will be sold on the 20th of November, 1899. I have today authorized Leroy M. Drown of Cleveland, Oklahoma, and will forward the money for the full payment of the taxes by next mail. Please not make me any extra or unnecessary expense; as you are absolutely sure of your money, I ask you to hold over if need be until its arrival.

Yours truly, S. R. WAGG.

130 Mr. CLARK: I next offer in evidence letter written on the same day, November 13, 1899, by S. R. Wagg to Mr. Litten, Cashier of the Cleveland Bank, of Cleveland, Oklahoma.

Thereupon Mr. Clark read the same, as follows:

APPLETON, WIS., *Nov.* 13*th*, 1899.

Mr. Litten, Cashier Cleveland Bank, Cleveland, Okla.

MY DEAR SIR: I am just advised by wire the Herbert 80 I hold mortgage on is to be sold for taxes on Nov. 20th.

I feel this is very unmanly on Herbert's part never to say a word to me of it. I have sent a power of Atty. to Leroy M. Drown to attend to the payment and money goes tomorrow for it and for your draft recently sent. Any aid you can give him will be appreciated. I told him to get the Deed in escrow and record it, that you have and for which I have your receipt. Of the 4 or 5 propositions made Herbert prior to the loan, he never acknowledged or accepted any. Our agreement is comprehended in the mortgage.

Yours, S. R. WAGG.

Mr. WRIGHTSMAN: Mr. Clark is that paged?

Mr. CLARK: This is one that was given me by counsel since our demand was made, and the page of the book was not furnished.

Mr. BIDDISON: What is the date of that letter?

Mr. CLARK: November 13, 1899. There are three letters all written the same day, all marked November 13, 1899.

Mr. CLARK: We next offer in evidence letter written by S. R. Wagg on December 14, 1899, to William L. Eagleton, Attorney, Pawnee, Oklahoma.

131 Thereupon Mr. Clark read the same, as follows, to-wit:

APPLETON, WIS., *Dec.* 14*th*, 1899.

Wm. L. Eagleton, Att'y, Pawnee, Okla.

DEAR SIR: The Herberts have defaulted in interest and allowed lands to be advertised for taxes and it has cost me in all about $6.00 extra to settle things up. This, to say the least, is poor taste never to say a word to me about it. I fear he may — trying to bleed somebody else by putting a second mortgage after having placed a deed in escrow to secure a debt. The man is not worthy of any confidence now and my wish is to save any complication with him and not to suffer from any of his sharp practice. As my retained attorney please be on guard and notify the Register of Deeds not to receive anything for record against the lands from the Herberts as they have already given a deed. I don't want to push him and shall not if you can protect my interest as indicated or some way.

Yours, S. R. WAGG.

Mr. CLARK: We next offer in evidence a letter from W. L. Eagleton dated January 18, 1900, or rather an extract from a letter from W. L. Eagleton, furnished us by the defendant, the whole of the letter not being here, and for which we have made a special demand.

Mr. BIDDISON: We have furnished here what was left at the former term of court. Now, that letter was either lost, by being left here at that time, or was lost in transit back,—letter from Mr. Eagleton to Mr. Wagg.

Mr. **Clark**: The letter does not bear—your copy does not bear—from which that is copied, certainly shown upon its face that the original was not here.

Mr. **Biddison**: The originals of these letters were here, and these copies that were introduced at that time were office copies that
132 I had made for my own use. They were introduced in lieu of the originals; that is, they were used in evidence in lieu of the originals on the former trial of this case.

Mr. **Clark**: And you made this extract?

Mr. **Biddison**: No, I had it made for me; I didn't make it.

Mr. **Clark**: What has become of the original.

Mr. **Biddison**: I don't know. It was here at the former trial. We had all these originals, of which these are copies, present at the former trial of this case.

Mr. **Clark**: From W. L. Eagleton, presumably, to Mr. Wagg, I presume that is—the copy was furnished us. Received from W. L. Eagleton January 18, 1900. I don't think, Mr. Biddison, that was furnished at the last term of court.

Mr. **Biddison**: It was furnished. I saw it here in this bunch a few moments ago.

Judge **Dale**: Well, it don't matter now.

Mr. **Biddison**: Here it is. Abstract of letter received from W. L. Eagleton January 18, 1900.

Mr. Biddison hands it to Mr. Clark.

Mr. **Clark**: That's right. It is conceded that this letter was written to Mr. Wagg by Mr. Eagleton?

Mr. **Biddison**: Yes.

Thereupon Mr. Clark read the same as follows, to wit:

"I fear Mr. "H" will not be able to meet his payments, in fact, I do not see how it is possible for him to live, let alone pay interest, taxes, insurance, etc., if a railroad should ever strike the town it will only sell as agricultural land and I doubt whether it would bring over $1200.00 at any time. He is a very determined man and if he cannot meet his payments and determines to give trouble, he of course can give trouble as he is not only determined but nervy and
133 shows considerable grit in a fight. I hope, however, that he will strike something and be able to meet his payments from this time as promptly as I would very much dislike to see him lose the place and would dislike to see you put to any trouble in regard to the matter. I would suggest this, however, that if you desire to at any time in the near future to withdraw your loan from that land and will let me know, I think I know a party that will take it off your hands without loss to you. The conditions in this country are not well enough defined for us to determine what the outlook of any particular locality is. We have no railroads now and it is owing to where they go when they strike this country as to what sections will be developed. We have a railroad building now to Pawnee, which will be extended north or north east, but the nearest that we can hope that it will — to this propecty is about ten miles, possibly fifteen. Let me hear from you?

Yours truly, W. L. EAGLETON."

Mr. Clark: We have been unable to produce the reply to that letter, as not having been furnished us.

Mr. Biddison: I think the reply is there. One with reference to it, anyhow.

Mr. Clark: Now, it is possible that some of this correspondence that was furnished yesterday—I have not read it, and it is possible it may be here.

Mr. Wrightsman: I want to call attention to the fact that this railroad was not built at the *the* time this transaction was had.

Mr. Clark: No, it was a year and three months, about.

Judge Dale: Here is a letter on January 15, 1900, in this letter book, from Mr. Wagg to Mr. Eagleton.

Thereupon Mr. Clark read the same, as follows:

134 July 15th, 1900.

E. L. Eagleton, Pawnee, Okla.

My Dear Sir: Yours of the 2nd was in the nature of a surprise. I retained you so I could send you my business as a client wanting a loan to get the writing done & etc. I supposed that lasted as long as I had business to send. That is the custom here. If yours is different I am not knowing to the fact. If you don't want me to send you any more business say so & explain why, & why I paid you retainer of $10.00 & therefor all the work was additional charges. Nothing worse than misunderstanding. Sept. 6th you acknowledged receipt of $5.00 with thanks. Dec. 3rd. I sent you my dft for 5.00 completing fees, that was not acknowledged.

For examining Herbert's title and encumbrances on August 20th, 1898 you charged me $1.50 for which I mail you P. O. order $1.50 this for some reason being overlooked at the time & now made right. You made your own retaining fee & it was paid. Herbert's first deed you never saw it & it was returned & the word I directed sent to you you subsequently made it I think. I suppose you collected from him for writing his mortgage. I supposed you collected from Mr. A. A. Drown for writing his? Mr. Drown forwarded his own tax receipts, contracts, & etc. Here the price for land contracts is one dollar & writing a deed $1.50 limited by law for plain work.

I have paid every charge you ever made except the one sight of $1.50 now remitted. If Mr. Herbert or Mr. Drown have failed to pay you, present them the bill for their mortgages & I will assist you to get it. I want things right & believe they are in the absence of further explanations. You are *wrong* in accusing Mr. Litten of taking the matter out of your hands in closing loan. I have
135 your letter of Sept. 17th directing me to send the money to
Cleveland to be there paid to Mr. Herbert & it was so done as per your direction. I suddenly learned in Dec. the security I held for my money was advertised to be sold for taxes. In my distress of mind, I wrote you to ask the Treasurer to hold sale as I had mailed the money. You replied you had seen him & it would be cared for. The money was paid on time, & I got my tax receipt. I did not write because there was nothing to write —— knowledge Mr. G. N. Bailey writing me you was in Washington for 10 days.

15 days ago I sent T. M. Broaddus $2.00 in full of all charges on my Herbert deed in his hands for which I have receipt of Dec. 20th. If you will kindly enquire of him & see its on record & the papers sent me & for which I enclose you 1.00 added to your P. O. order of 1.50 making $2.50 in settlement of all charges to date.

S. R. WAGG.

Mr. **Biddison**: If the court please, I object to that. It is correspondence between attorney and client, and I object to its introduction in evidence.

Mr. **Clark**: Their allegation is that he was our agent.

Mr. **Biddison**: Simply in the one transaction, which we point out. There is no al-egation of general agency. There is no question but in examining this title, Mr. Eagleton was Mr. Wagg's attorney. The only question is whether or not he did not, when this trouble came up, act as the friend or agent of the Herberts; he wrote to get an extension of the loan on behalf of the Herberts, and Mr. Wagg's reply, that is the only question here, not that we allege he was the agent of the other parties at all. But on the propositions here between attorney and client,——

The **Court**: If it related solely to that, I presume it would not be competent.

136 Mr. **Clark**: It seems to us it ought to go into the record, even though the court should exclude it, in order that we may make a perfect record.

The **Court**: No, I don't think so.

Judge **Dale**: It would not be material, except to show the relationship these parties held to one another.

The **Court**: In this letter of December 14, of Wagg, to Eagleton, he informs him that Herbert has defaulted in taxes and interest, and asks him to represent him in the matter, and to take certain steps for him; and in the letter of January 18, 1900, of Eagleton to Wagg. Eagleton informs him that if he don't want to foreclose, if he thinks he is liable to lose it, if he will let me know, he thinks he can find somebody to take it off his hands. The letters there show that Mr. Wagg has employed Mr. Eagleton to look after his interests. And he also says that in a former letter to the other party.

Mr. **Clark**: Save an exception to the ruling of the court.

Judge **Dale**: Well, that is the substance of that letter. Now the next letter from Wagg to Eagleton is on January 25, 1900. We now offer in evidence letter bearing date January 25, 1900, copy of which is found in copy book presented to us by Mr. Wagg, page 370, in which Mr. Wagg sends to Mr. Eagleton $2.50 upon account of services rendered, and also refers to Herbert's determination, etc. That was in response to that letter of Mr. Eagleton's. And in this letter—I think this letter is competent in one phase of it.

Thereupon Judge Dale read the same, as follows, to wit:

S. R. Wagg, Appleton, Wis.

JAN'Y 25TH, 1900.

P. O. Order #1976.

Wm. L. Eagleton, Pawnee, Okla.

MY DEAR SIR: Yours of the 18th at hand & noted. I send
137 $2.50 to make the balance $5.00 to meet your offer making a total of $15.00 sent you.

In all propriety it was Drown's and Herbert's business to pay their own mortgages & not my chg. at all. The only proper charge to me was on the *record work* I asked for.

This clears all matters up & now start over. I note what you say about Mr. Herbert. I am sorry for his reduced circumstances," etc.

Judge DALE: That is all that refers to the particular case.

Mr. BIDDISON: Is this letter you just read from, offered in evidence?

Judge DALE: Yes sir.

Mr. BIDDISON: We object, unless the letter is offered as it is.

Judge DALE: We offer the whole thing. I don't care to read it all, because a lot of it does not apply.

The COURT: The court has no means of determining what part is competent, unless it is read to the court, or examined by the court.

Judge DALE: Well, I will read it.

Thereupon Judge Dale continues to read as follows:

"This clears all matters up & now start over. I note what you say about Mr. Herbert. I am sorry for his reduced circumstances & hope he may recuperate. Determination is a fine quality *well* directed in proper channels of action. The great prizes of life are now in the peaceful pursuits of commerce & Diplomacy.

Yours truly, S. R. WAGG.

Judge DALE: I didn't care about the man's philosophical digressions as a part of the case, because I didn't think it bore on the case.

The COURT: We will take a recess until half past one.

138 After said recess, upon the re-convening of court at 1:30 o'clock P. M., all parties being present as heretofore noted, thereupon the following proceedings were had and done, to wit:

Mr. CLARK: The last communication we read was on December 14, 1899, with Mr. Eagleton. Just before that, the last communication before Wagg and Dorwn, was Wagg's ackknowledging receipt of the telegram from Drown; and then the correspondence with Eagleton. Then that which was furnished us skips to February 17th. And there were some intermediate correspondence there that we were quite anxious to produce at this time.

Mr. BIDDISON: Well, it is here; any that Mr. Wagg wrote is in the copy books.

Judge DALE: Well, go ahead, Mr. Clark.

Mr. Clark: I will now introduce in evidence letter written by S. R. Wagg on February 17, 1900, to Leroy Drown, Cleveland, Oklahoma.

Thereupon Mr. Clark read the same as follows, to wit:

Appleton, Wis., *Feb.* 17, 1900.

Mr. Leroy Drown, Cleveland, Okla.

You are hereby authorized to act as my agent in looking after my lands and tenants on the Herbert property at Cleveland Okla. Collect rents monthly, sell the hay crop standing if possible and report to me once in three months and keep me advised of any change of interest from time to time.

Deposit all proceeds in Bank to my credit.

Yours truly, S. R. WAGG.

139 Mr. Clark: I next offer in evidence letter written by S. R. Wagg on April 14, 1900, to W. H. Herbert and wife, Cleveland, Oklahoma.

Thereupon Mr. Clark read the same as follows:

Appleton, Wis., *April* 14, 1900.

W. H. Herbert and Wife, Cleveland, Okla.:

I expect to be in your city or town in the near future and in as much as the loan of October 1898 is in default of payment of interest, and the months allowed you as grace in which to make it good expires during the month of April 1900, I ask that you make up all payments due to date either to me or place to my credit in Bank of Pawnee, subject only to delivery of my receipt for same, otherwise the title to the Cleveland homestead will by virtue of our agreement and papers of record, pass to my ownership and control. I hope you will pay up past dues and notify me of action you take in the matter, I am,

Yours truly, S. R. WAGG.

Judge Dale: Now here is a letter to Leroy Drown, of February 26, 1900. Omitting the first part, it reads:

"You take possession of all vacant houses, or have it done for me, on the Herbert place; and rent them as best you can. Don't let any squatters get back. They are easy rid of now. Keep rid of them, and don't let a person in except on a good lease, so you can get him out without expense. Herbert we will treat generously. I wish him well.

Yours, S. R. WAGG."

Mr. Clark: I now offer in evidence a letter written by S. R. Wagg on April 30, 1900, to W. H. Herbert, at Wichita, Kansas.

140 Thereupon Mr. Clark read the same as follows:

Appleton, Wis., *April* 30, 1900.

W. H. Herbert, Wichita, Kansas.

My Dear Sir: Your letter of the 27th at hand. I was obliged by circumstances you made, to put my deed on record, allowing the property to be offered at tax sale. I sent money to pay them.

I do not propose to be hasty or unfair, if you want to pay the interest up, you can do so, I have not asked for any full payment of principal, the interest will do—I had not intended to foreclose or turn you out of the house, and shall not unless you fail to do anything. I expect the hay crop will help pay the interest. I shall trust you for it. I shall expect to be in Cleveland but do not go to the expense to see me. If you are there, I shall be glad to see you.

Yours truly, S. R. WAGG.

Mr. CLARK: I will now read a letter by S. R. Wagg, on May 16, 1900, to the County Treasurer of Pawnee County, Oklahoma.

Thereupon Mr. Clark read the same as follows:

APPLETON, WIS., *May* 16*th*, 1900.

County Treasurer's Office, Pawnee Co., Okla.

MY DEAR SIR: I enclose you Chicago draft # 175879 for $34.35 in full of all taxes to date on land formerly owned by W. H. Herbert of Cleveland, Okla. And described in last tax receipt as lot 7 and 8 block 6 Jordan Valley Tp.

As I now have the deed to above land and recorded you can tax in my name and kindly mail me notice when taxes are due at any time. 141

Yours truly, S. R. WAGG

Mr. CLARK: That precedes the last four I read.

Judge DALE: Here is one March 21, 1901, from Mr. Wagg to Drown.

Thereupon Judge Dale read the same, as follows, to wit:

S. R. Wagg, Appleton, Wis.

MARCH 21ST, 1901.

Leroy M. Drown, Cleveland, Okla.

MY DEAR SIR: In accord with Clarks advise I made the land contract subsequent to the deed. When deed is signed you stamp and cancel it at my expense as Mrs. H. has no money.

I enclose one copy of land contract which you sign April 1st, 1901, & send me. Do it before a notary.

On that day I will sign mine in same way & will stamp mine so it goes at Register office. (Your duplicate will not need stamp.) And mail you at the time.

I charge you to be very careful no deed or release of mine leaves your hands until you have Mrs. M. B. H. deed to me duly executed—and delivered to you.

Any refusal to execute return every paper to me *at once.*

Yours truly, S. R. WAGG.

By Registered Mail.

142 The COURT: Who is that to?

Judge DALE: To Leroy M. Drown.

Mr. Biddison: That is a year later than the last four, instead of preceding them.

Judge Dale: Yes, I see. I beg your pardon.

Mr. Clark: It is out of order in that respect, and may be so considered. The last one I read was a letter to the County Treasurer, remitting taxes. I now offer in evidence letter written the day following, May 17th, 1900, by S. R. Wagg to W. L. Eagleton, Pawnee, Oklahoma.

Thereupon Mr. Clark read the same as follows:

Appleton, Wis., *May* 17*th*, 1900.

Wm. L. Eagleton, Pawnee, O. T.

My Dear Sir: Your favor of April 30th I found on my return home, out of defferences for your request, I will wait on W. H. Herbert as requested until Oct. I called at the Wichita Hotel he was said to stop at, but found him only an occasional caller. Consequently did not see him. In granting this request, I do it with the express understanding that I am to have the hay crop to put against taxes, etc. I have just paid the second year's taxes. As a business man you know this is not pleasing to the lender to put up over $60.00 in taxes, as a matter of agreement made before and put in effect simultaneously with the signing of the mortgage with the agreement on the deed and recording of same, the deed is now recorded. I have not asked any one to take it off my hands but to carry out the payment of interest and taxes as per contract.

Yours truly, S. R. WAGG.

143 Mr. Clark: I wish to call attention to the fact that that letter referred to as "your favor of May 17, 1900" is one of the letters which we have demanded, and which they refer to in their pleading, but which has not been furnished us. And I desire to suggest, also, that no reply to that letter from Mr. Eagleton has been furnished us.

Mr. Clark: I now offer in evidence letter written by Mrs. W. H. Herbert on July 12, 1900.

Judge Dale: First, I have one here of June 5, 1900, from Mr. Wagg to Mr. Drown.

Thereupon Judge Dale read the same, as follows:

S. R. Wagg, Appleton, Wis.

June 5*th*, 1900.

My Dear Roy: Your very interesting letter of the 1st is at hand. I have on file a letter of W. L. Eagleton saying those parties on Herbert's land McGee & others had not right or title to the land, but that McGee did have some claim against him, Eagleton, which he should satisfy—I have Eagleton's letter saying absolutely the mortgage "H" gave me is *all right*. If Eagleton don't look out he may get into a snap. Go cool and careful. Cut the hay without delay & save any possible chance for them to get a clue on it, lease the privilege of piling it on a 3rd party's land if you can, and find a party you can trust for it. The claim that——"

Judge DALE: Mr. Clark, you read it.

Thereupon Mr. Clark read as follows:

"JUNE 5*th*, 1900.

MY DEAR ROY: Your very interesting letter of 1st is at hand. I have on file a letter of W. L. Eagleton, saying those parties 144 on Herbert's land, McGee & others, had not right or title to the land, but that McGee did have some claim against him, Eagleton, which he should satisfy——"

Mr. BIDDISON: If the court please, we object to the introduction of this in evidence, for the reason that it has reference to entirely another matter. It has reference to the right of W. L. Eagleton to go upon these premises and exercise the right of ownership there through this man McGee, and it is entirely incompetent.

Mr. CLARK: That is true, but here is a part that is competent. The next clause, for instance, which shows he has taken advice concerning the papers.

"I have Eagleton's letter saying absolutely the mortgage H. gave me is all right. If Eagleton don't look out he may get into a snap. Go cool & careful. Cut the hay without delay & to save any possible chance for them to get a clue on it, lease the privilege of piling it on a 3rd parties land if you can find a party you can trust for it. The claim that Eagleton could give title as agent is bosh, & *too thin*—Sutton held mortgage before me & there is a continuation of mtg right from S. to me, and even Herbert could only deed subject to mtg. rights. Yet we will treat the whole outfit as rascals as they properly deserve. Herbert gets *no more* favors. The land is mine & from now on will be treated as such.

You notify the woman as my Agent to pay no rent except to you. Cut the hay & get it off the land as quickly as you can.

Do you think there is a game to beat me out of my land?

Quietly study the plan or have some one do it for you. It will cost them all its worth to do it & More. Take a strong stand. If a deed with 2 yrs taxes paid is good I have it.

You hand this enclosed letter to Swan——"

Mr. CLARK: Well, that is a different transaction.

145 Mr. CLARK: Now, next following that, I have one here of July 12, 1900. And across the top of it is written: "Answered July 18th."

The COURT: From whom to whom?

Mr. CLARK: From Mrs. W. H. Herbert to S. R. Wagg, of Appleton, Wis.

Thereupon Mr. Clark read the same, as follows, to wit:

"CLEVELAND, OKLA., *July* 12, 1900.

Mr. S. R. Wagg, Appleton, Wis.

DEAR SIR: I write believing you will see the justice of the request I am about to make. The anxiety I suffer in regard to my home is undermining my health. The conditions of the land precludes the possib-lity of my using it to the benefit of myself and children. I

wish you to have the equivalent of the debt in land if I do not get the money to pay you, but I do not wish to give double and since you have seen the land you must recognize it is more valuable than the amount you have in it. I wish to know if you would take half the land for the debt? The half next to Cleveland, which is the more valuable, I presume. I wish to have the other free from incumbrance to cultivate for a living for my children. If you are not willing to do this would you allow me to sell forty acres, which I can do, to cancel the indebtedness; that is, to obtain a purchaser, the money to be paid to you? When you was here you said you did not want the land, you only wanted your money which I am anxious for you to have. I write this knowing you could not possibly in justice to your ideas of right, take all the land for the debt, especially as I am not responsible for it and I would necessarily be the chief sufferer. If you accede to this request you will remove a great burden from me and I can proceed to arrange to have the forty acres broken this fall in readiness for cultivation in the spring. The
home is so much more to me than the money can possibly be
146 to you; however, I am sure you will understand I desire to
settle the affair in justice to us both. I wish you to have your money or its equivalent in land, but I do not want to lose my home. Half of the land means a home to me and support for myself and family, to lose it means to us to be homeless. I present the matter thus plainly that you may realize what is involved in it to me, hence it seems to me the only just way, to us both, to settle the affair, under the circumstances, is to divide the land. I mean of course, if we should be disappointed and be unable to get the money for you before the expiration of the time you have extended. I think I will have it, but as there are few things absolutely certain in life and desiring so much for my health's sake, to be relieved of the strain in connection with the matter, I appeal to you, believing you will be disposed to show the same mercy you would like shown to yourself or loved ones.

Hoping to be favored with an early reply, I am,

Very respectfully, (MRS.) W. H. HERBERT.

Mr. CLARK: The next I have is July 18,—answering that letter—from S. R. Wagg to Mrs. Herbert.

Thereupon Mr. Clark read the same as follows:

APPLETON, WIS., *July* 18, 1900.

Mrs. W. H. Herbert, Cleveland, Okla.

MY DEAR MADAM: Your favor of the 12th is before me, in reply will say I do not incline to a division of the land; but under the condition I will deed back to you the land for $1300.00 October or
Nov. next as you can arrange, the back interest, taxes, ex-
147 penses incurred and holding the principle five months before
loan was closed amounts in all to $1280.00 and as the loan is for five years, it is a concession I would not make with a business man and only do it to you as your situation merits some considera-

tion, so I do this for immediate action and acceptance on your part—notify me of your intention in the matter.

Yours Resp'y, S. R. WAGG.

Judge Dale: Here is one I want to read now, July 18, 1900, from Mr. Wagg to Mr. Roy Drown.

Thereupon Judge Dale read the same, as follows:

S. R. Wagg, Appleton, Wis.

July 18*th*, 1900.

My Dear Roy: Yours of the 14th at hand & the enclosed letter press copy to Mrs. Herbert explains itself. I would not let old H. have it. His plan was to get the money, and have the security doubtful. I know from first papers sent & that I returned & subsequent developments. I will take this money & let it to Swan or buy Jordan bottoms, if he don't take it. You keep your eye on Jordan & get his terms & etc. Get an option on the lands if Swan don't take my loan & we will buy & lease them & I will sell you a ½ interest in them and we work them out together.

I am not certain of the sincerity of the Herbert move or that there is not something behind. My offer will develop something or another. Do you suppose they would offer to share a loss if it was to fall on me? They do ask to share an expected profit they think I may get."

148 Judge Dale: The balance of the letter does not apply.

Mr. Clark: The next I have here is written July 18, the same day as the letter I last read, and three days before the one just read by Judge Dale; Written by S. R. Wagg to W. L. Eagleton, Pawnee, Oklahoma.

Thereupon Mr. Clark read the same as follows:

Appleton, Wis., *July* 18*th*, 1900.

W. L. Eagleton, Pawnee, Okla.

My Dear Sir: Your letter of recent date to L. M. Drown has been forwarded to me for reply, on the question of why rent notice was served on a tenant on the lands of the former homestead of Herbert. I answer for the reason that I have a mortgage and also a deed of the land in question and have over due and unpaid interest as well as 2 years' tax receipts that I have paid; under the belief that a house belonged to the land on which it set and that the abstract of title which you furnished me does not show any prior title over my mortgage. If I am in error, please explain wherein and how?

Respectfully, S. R. WAGG.

Mr. Clark: I now offer in evidence a letter written by Mrs. W. H. Herbert, to S. R. Wagg on July 23, 1900.

Thereupon Mr. Clark read the same, as follows:

Cleveland, Okla., *July* 23*rd*, 1900.

Mr. S. R. Wagg, Appleton, Wisconsin.

Dear Sir: Yours of the 18th inst. to hand. I will, if possible, have the money for you by the time specified. I requested a division

of the land in the event I should not be prepared to liquidate
149 the indebtedness in the fall. Mr. Herbert being from home
I could not consult him as to the advisability of the proposition I made to you; he has been very sick which delayed his business so in my anxiety I thought of a division of the land as a certain way by which you can obtain your money or its equivalent and I retain my home. I am sure if you understood the situation fully you would favor a division. Hoping you will give the subject further consideration I am very respectfully,

(Mrs.) W. H. HERBERT.

Mr. Clark: The next I have is on August 11, 1900, written to Mrs. Herbert by S. R. Wagg.

Thereupon Mr. Clark read the same as follows:

Appleton, Wis., *Aug. 11th*, 1900.

Mrs. W. H. Herbert, Cleveland, Oklahoma.

Dear Madam: Your favor of some weeks ago, asking for a reconsideration of my declining to divide the land came to hand and is noted. On payment of $1300.00 October or Nov. 1st 1900, I will quit claim deed to you or your purchaser one half the Herbert homestead deed to me and deed the remaining half farthest from or west of Cleveland to your two boys jointly reserving to you a life interest in the same; provided you explain clearly and satisfactorily to me how and by what means W. L. Eagleton obtained title to the house located on the said homestead and is now renting and claims the rights of a property holder to do so and collects rents—if anything is done would like to close it up entirely—I never had thought of turning you out and do not expect ever to do such a thing.

Awaiting your further communication, I am,

Yours truly, S. R. WAGG.

150 Mr. Clark: The next I have is August 19, 1900, written
by Mrs. W. H. Herbert to S. R. Wagg, in acknowledgment of the receipt of his letter, the one I read before.

Thereupon Mr. Clark read the same as follows:

Cleveland, Okla., *Aug. 19th*, 1900.

Mr. S. R. Wagg.

Dear Sir: Your letter of the 11th inst. has been received. I thank you for your consent to a division of the land. The way you propose to deed it is an advantage insome respects and a disadvantage in others from my point of view. I have not yet decided which out weighs the other, however we can speak of this later if desired. I was hoping you would not only agree to a division but that you would decide to retain the forty acres, because if you would hold it for a year or two I could redeem it with interest on the investment; in other words buy it back from you if you wished to sell it, whereas if it is sold to another party I would possibly not have an opportunity to redeem it.

In regard to that of which you desire information, I have to say that Mr. Eagleton has no legal right to the house referred to, he as

a lawyer is fully aware he has not but he is one of the many who have sought to get a claim on the land, as it could not be done legally then otherwise. He claims to have bought the house from E. L. McKee; He knew at the time that it did not belong to McKee, that the house was mine, that he had no right to sell it or he to buy it. The way McKee came to be in possession of the house, the Cleveland Townsite Co. wanted this land for Cleveland; they first tried to get it from Mr. Herbert, as he declined to relinquish it the-told him they would contest him; as they could not do it as a Townsite Co. they did it by proxy and McKee was the proxy. Before
151 the contest was settled there was a Townsite Co. organized at Pawnee with some of the Cleveland people as members. The leaders of this maliciously circulated the report that this land had reverted to the government, so on the night of the 17th of April 1894, they made a run on it, armed and staked lots. McKee was one of the number; he doubtless hoped if the contest failed that would give him another claim. Those people who were in the lawlessness innocently withdrew; the leaders sent protests to Washington which were regarded there as persecutions, and Mr. Herbert was advised to prosecute the persecutors. The combined force of these two townsite Companies were against Mr. Herbert, throughout all the persecution he was law abiding, he fought legally for his home. A man who would not do that is not worthy of one; he won it because he was the only one entitled to it. It is evidence that he was the only one who had a right to it or he could not have gained it against the united efforts of all these people, it made him disliked however and some of them still seek to prejudice strangers against him. The expense of contest exhausted our means which together with ill health caused us to have to mortgage the home. Before McKee vacated the house he sold it to Mr. Eagleton who has always claimed to be a friend of Mr. Herbert but some of his actions have not been such as one would expect from a friend. He has endeavored upon this claim of friendship to obtain a title to the property but Mr. Herbert declined to sign the papers he sent to him: He bought the house from McKee, whom he knew had no right to sell it, without our knowledge or consent. He was aware of the fact that the patent issued by the government to Mr. Herbert included all improvements, so specified in the deed and that Mr. Herbert had deeded it to me. Mr. Eagleton can not show any title to the house other than what was given by McKee, which of course is equivalent to none.

152 To give you the requested information I had to bother you with a lengthy letter which relates only a small part of the persecution endured for the sake of our home. Any further information desired I will be pleased to write.

Again thanking you, I am

Yours respectfully, (Mrs.) W. H. HERBERT.

Mr. Clark: The next letter I have is September 15, 1900, written by S. R. Wagg to Mrs. W. H. Herbert.

**Thereupon Mr. Clark read the same as follows, to wit:**

APPLETON, WIS., *Sept.* 15, 1900.

Mrs. W. H. Herbert, Cleveland, Okla.

DEAR MADAM: I am in receipt of a letter from L. M. Drown regarding an answer to your last letter replying to mine of August 11th, I did not think an answer necessary. However you can go ahead and find a purchaser at $1300.00 for the east ½ (half) and I will deed the other half jointly to your two boys, giving you the first right to the income from the same in form of a life interest. This places it beyond the power of any one to scheme you out of it. I make this offer solely in the interest of yourself and your boys. I reserve the right of one acres on the east side, near Mr. Drown's store for warehouse purposes, same to be located when deed is made.

I hope you may be able to realize your wishes in securing a home for yourself and boys. If you cannot make this sale, I will devise another plan later.

Yours respectfully, S. R. WAGG.

153 Mr. CLARK: The next I have is September 29, 1900, from S. R. Wagg to Mrs. W. H. Herbert.

Thereupon Mr. Clark read the same as follows, to wit:

APPLETON, WIS., *Sept.* 29, 1900.

Mrs. W. H. Herbert, Cleveland, Okla.

MY DEAR MADAM: In selling the east ½ of the 80, you need not make any allowance for an acre of the east side; mentioned in my last letter.

Sell it whole, straight lines.

Respectfully yours, S. R. WAGG.

Mr. CLARK: The next I have is December 24, 1900.

Judge DALE: I have one here I want to read first. It is on October 5, 1900, from Mr. Wagg to Mr. Drown, headed "Personal and Confidential."

Thereupon Judge Dale read the same as follows, to wit:

*Personal & Confidential.*

OCTOBER 5, 1900.

MY DEAR ROY: Contract for the corn as fast as you can at best terms possible & for all we can store—it's going higher soon I think.

On the Herbert matter go slow until Nov. 1st. After that time we will make a deal with interest at figures named by you & I will go ½ with you if you desire it provided no buyer is found by H.

I will deed Mrs. H. a suitable lot of land & the house & how much etc. we can decide when the time comes. Remember all the increase in value don't belong to Mrs. H. It's my land now, and I propose to treat her fairly & liberally & my mind is now 15 to 20 acres & the house would be a liberal gift & afford her & the boys more than they would get from most anybody else under similar conditions. If she carries out her plan its O. K. You may
154 consider this plan. I take my way of bringing it about. If things had gone down I would have been left to hold the bag

and pocket the loss, now there is a rise they whine and squirm & want all there is and talk about justice & charity. When the original papers presented were defective with no doubt a plan to cheat me with defective title and description & all considered *don't* make me feel kind or good for that Herbert is worthy of what I offer or shall offer.

I return the paper & return some made by yourself that was after months signed reluctantly I believe because they were sound & will hold.

You consider carefully the matter. I want $1300.00 cash from the buyer H. finds. If she don't find him we will fix a deal.

Truly yours, S. R. WAGG.

Mr. CLARK: The next I have is December 24, 1900, written by S. R. Wagg to Mary B. Herbert.

Thereupon Mr. Clark read the same as follows:

S. R. Wagg, Appleton, Wis.

DECEMBER 24TH, 1900.

Mrs. Mary B. Herbert.

MY DEAR MADAM: Referring to your last communication, wherein you wanted time to sell extended to Jan'y 1901.

I hope you have been able to find a buyer. However, you can have until March 1st next if you need such time.

If you should feel like making a division of the land as a final settlement of the matter and passing deeds although I hold a deed of it all and under our agreement it all is now conveyed to me, yet I shall not use any rights I may have harshly but shall deed to you and your boys a piece of the land preferably on which the
155 house is located so you may still live there and have land to cultivate for your support. You talk it over with Mr. L. M. Drown and have him write me.

I remain,

Yours respectfully, S. R. WAGG.

Mr. CLARK: The next I have is March 18, 1901.

Judge DALE: I have one here between those dates I want to read. On January 5, 1901, a letter from Mr. Wagg to Mr. L. M. Drown, of Cleveland. The last portion of the letter bears upon this case, and reads as follows:

Thereupon Judge Dale read the same, as follows, to wit:

"You can have ½ in the Herbert land after settlement with Mrs. H. Yours truly, S. R. Wagg."

Judge DALE: Now, following that letter, a letter bearing date January 29, 1901, the latter part of it, from Mr. Wagg to Mr. Drown.

Thereupon Judge Dale read the same, as follows, to wit:

"What is the hay situation, sales, etc.?

I am at a loss what to do about the Herbert matter & don't relish buying what I now own. Not to be hard I thought to give her 10 acres. I had rather give her 15 than buy—or if you say so & she agrees will give 10 acres & $100 cash to close up. You see her. Usually such cases are not so treated.

Yours, S. R. WAGG."

Judge DALE: On February 9, 1901, a letter from Mr. Wagg to Leroy M. Drown, marked "Confidentially".

Thereupon Judge Dale read the same as follows, to wit:

"Regarding the H. matter the demands are still too much in my opinion & you tell her my opinion in plain terms. I am willing to be generous in her case. I will do this. I will deed her 20
156 acres, south and including house, if this don't take in house will fix it so it does in some manner to be yet decided. She can have 1 to 10 days to accept & advise me. If declined she can go further & get less. I have no more to say. No pay'ts of any kind by me except taxes. All papers to be made by Clark suitable for perfecting papers of both parties—W. D.—(that means warranty deed) and title. This done we will proceed along the line of your suggestions. I have not figured up anything yet. When I get time I will. Yours truly, S. R. Wagg. County seat-Bridge-R. R.-land values, etc., noted; look for bargains."

Judge DALE: On February 18, 1901, a letter from Mr. Wagg to Mr. Drown, the last two lines of which refers to this matter.

Thereupon Judge Dale read the same, as follows, to wit:

"You fix up the Herbert matter, if it can be fixed up & we will see about your plan, etc. Yours, S. R. Wagg."

Judge DALE: A letter of Februar—it is blotted, but I think it is the 21st, 1901, from Mr. Wagg to Mr. Drown:

Thereupon Judge Dale read the same as follows, to wit:

S. R. Wagg, Appleton, Wis.

FEB. 20TH, 1901.

MY DEAR ROY: Yours of the 15th at hand & carefully noted. I appreciate your plea & will grant at least in part.

Run the line 10 ft. north of the house and allow trees to be transplanted south. This squares up each lot. I quite agree with all you say of her & believe all you say of the old man. I so plainly see his plan to skin me in the start that my views are not any easier for it & I do not regard it as plain interest matter only on the developments reached. 1st I want an abstract to see nothing is changed since I got my land. 2nd. I want to knock out old Eagleton
157 on that house and I shall also call for a new deed from Mrs. H. of same date as the one I have written by Mr. Clark as well as an affidavit of the genuineness of the deed written by Litten & signed jointly by herself & her husband. I have an object in this & you disclose nothing to her at any time until she accepts all terms submitted.

I shall do nothing until I get law book on Oklahoma & can have it done right & no changes to be afterward desired. Then I will deed her the land from point named south or to her sons she to have a life interest in same & all its income. I want so old Herbert can't even get a cent of it or she give to him. What do you say?

I quite agree with your plan to plat. It's the money making way — sure. Will sell you the half interest with me. You to handle on a commission basis. I think I ought to get $700 for it, 5 to 10 yrs to pay for same are easy terms & worth something.

We want to plat as we sell, as on platted property taxes will be much higher.

5 lots per acre is good size & $100 per lot foots up big, but this is a matter of slow growth & time. A Bridge & County Seat will make it big for us & good enough to keep.

Take off hay & keep good sod is best for us is it not? I leave these matters largely to you. What's that 80 east of your father's house worth? Tell your father Johnson says no danger.

I hope this may meet your views, about. I ask to let me know how much corn we have & if *crips* are full.

Yours, S. R. WAGG."

Judge DALE: Here is a letter from Mr. Wagg to Mr. Drown, bearing date March 16, 1901.

Thereupon Judge Dale read the same, as follows, to wit:

158 *Confidential.*

"S. R. Wagg, Appleton, Wis.

MARCH 16TH, 1901.

Leroy M. Drown, Cleveland, Oklahoma.

MY DEAR SIR: Your registered letter with the abstract & other papers at hand & will get at deeds soon as I get the statutes. Litten made the dates on the deed, don't think it affects anything but I want it corrected in another deed to me to cover the pretext of Eagleton on the house near your store, & say nothing. I sent my own deed to the bank written by Jones here & the one I have was substituted for it unknown to me by the bank & if anything comes up wrong shall hold them, in mean time say nothing, & get another deed correct absolutely. Mtg. is solid, but spend no money until this is right. I found this out a few months ago."

Judge DALE: That is all I care to read of that. There is nothing else that bears on this case. That letter is marked "confidential."

Mr. CLARK: The next I have is March 18, 1901, from S. R. Wagg, to Mrs. W. H. Herbert, Cleveland, Oklahoma.

Thereupon Mr. Clark read the same as follows, to wit:

"S. R. Wagg, Appleton, Wis.

MARCH 18, 1901.

Mrs. W. H. Herbert, Cleveland, Oklahoma.

MY DEAR MADAM: Your letter of March 5th came duly to hand. The option extended to you expired on the 1st of March.

On March 4th I sold a part to Leroy M. Drown and it is our intention to deed you the house and a liberal piece of land in the early future.

159 I think I can safely say Mr. Drown will accord you every courtesy and the most generous treatment, in which I shall concur.

Yours very truly, S. R. WAGG."

Mr. CLARK: The next I have is May 12, 1901, from S. R. Wagg to Leroy Drown.

Thereupon Mr. Clark read the same as follows:

"MAY 12TH, 1901.

DEAR ROY: Before surrendering mortgage lease and note to Mrs. Herbert, please learn from a reliable lawyer, after explaining to him the transactions and conditions fully, whether or not the mortgage ought to be foreclosed to be strictly and fully legal.

In any event you take a statement from Mrs. Herbert, that she deeds to me for and in consideration of $1000.00 in hand paid, etc. all in legal form witnessed and signed before a notary. I do not want any old questions coming up hereafter also ask the attorney about minor children interests. Deliver no papers until you settle satisfactorily all of these questions. I ought to have sent this with the release.

Yours, S. R. WAGG."

No attorney here knows these questions as an attorney in the Territory familiar with the practices there."

Mr. CLARK: The next I have is May 5, 1900.

Judge DALE: I have one here ahead of that.

Mr. CLARK: We now offer in evidence a letter written by S. R. Wagg on April 21, 1901, to the First National Bank of Pawnee, Oklahoma.

Mr. BIDDISON: To which we object as incompetent, irrelevant and immaterial.

160 The COURT: Read it, and let's see what it is.

Thereupon Mr. Clark read the same as follows:

APRIL 21ST, 1901.

First Nat. Bank, Pawnee, Okla.

GENTLEMEN: Your favor of the 28th at hand enquiring about the purchase of a piece of land at Cleveland Okla. formerly owned by Mrs. Herbert and now owned by the writer.

The time at which Mrs. Herbert had to take it up or find a buyer had expired some time before any notice was sent me and a partial sale has been made to Leroy M. Drown of Cleveland.

If Mr. Sloan still wants to buy he had better communicate with him. It will take more than $1300 to buy it now.

Yours truly, S. R. WAGG."

Judge Dale: Also on April 21——

Mr. Clark: Now, one minute. In this connection, will it be necessary to have Mr. Shapard come over to prove the contents of the letter to him, to which this was an answer, or will you gentlemen concede it?

Mr. Biddison: I don't know anything about it. I object to the introduction of that as irrelevant and immaterial.

The Court: I don't think the letter from the bank to him would be competent.

Mr. Clark: The nature of that would be advising him that they had thirteen hundred dollars to pay to him—No, fourteen hundred and something, to pay to him for the relinquishment of the Herbert land, and to which he sent this reply.

The Court: Written for Mrs. Herbert, or on their own account?

Mr. Clark: Yes, for Mrs. Herbert.

161 The Court: If they offered to pay it for her it would be proper, otherwise it would not.

Judge Dale: I have another letter here of April 21, 1901, written by Mr. S. R. Wagg to Mr. W. E. Deem, which, I will say to the court, will be made competent on this ground: Mrs. Herbert went to Mr. Deem, and Mr. Deem, I believe, offered to loan her the money to take up this mortgage, or made arrangements with Mr. Deem to buy a part of the land, I don't know which, but she will explain it. Mr. Deem wrote to Mr. Wagg, and on April 21, 1901——

Mr. Biddison: We object to the introduction of the letter, as incompetent, irrelevant, and immaterial, no sufficient foundation laid; and we object to the competency of the copy of that letter until we know something about what they are driving at. I object to it, for the reason that the competency of the copy is not established.

Judge Dale: This is your own copy book.

Mr. Biddison: Suppose it is. We don't admit its competency for you to use it.

The Court: A letter from Deem to Wagg?

Judge Dale: No, sir, a letter from Wagg to Deem, and it is in their own copy book.

The Court: The objection that it is not the best evidence is well taken.

Mr. Clark: I submit it is an admission.

Judge Dale: It is a letter from Mr. Wagg, to——

The Court: I understand what it is, Judge, but the letter is the best evidence.

Judge Dale: We called for the original, or a copy, and they furnished us this as a copy.

Mr. Biddison: There has never been any demand for any correspondence between Mr. Wagg and Mr. Deem. This is simply the result of counsel's examination of private matters in the copy book.

162 The COURT: Well, it will have to be made competent.

Judge DALE: Well, I suppose we can make it competent by another matter.

W. E. DEEM, being produced and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Judge DALE:

Q. You may state your name to the court.
A. W. E. Deem.
Q. Where do you live, Mr. Deem?
A. Cleveland.
Q. How long have you lived there?
A. How long?
Q. Yes sir.
A. Close to eleven years.
Q. Are you acquainted with Mrs. Herbert?
A. Yes sir.
Q. I will ask you if you, at her solicitation, agreed to make an arrangement about purchasing a part of this eighty acres of land from here in the spring of 1901?

Mr. BIDDISON: Wait a minute. Objected to as leading and suggestive. Let the witness state what he did.
The COURT: He may answer the question. It is preliminary.
Judge DALE: Answer the question.

A. In the year 1901, you say?
Q. Yes, the spring of 1901?
A. Why, I can't call the date to memory clearly, but it must have been about that time.
Q. Did you write to Mr. Wagg about it?
A. I don't remember whether I corresponded with him in regard to it or not.
Q. Well, did you get a letter from Mr. Wagg?
163 A. I don't remember that.
Q. Why don't you? Didn't you keep it?
A. No, sir, I kept no account of it.
Q. Are you a business man down there?
A. Not very much business. I ain't now, no sir.
Q. Were you at that time?
A. I was farming down there.
Q. Were you in the habit of writing many letters at that time?
A. No sir.
Q. Don't you think you would be pretty apt to remember a letter written in reference to this matter?
A. It don't seem like I remember it. I remember the transaction, but I don't remember of any correspondence with Mr. Wagg.
Q. Have you got in your possession a letter written by Mr. Wagg to you, bearing date April 22, 1901?

A. No sir, I have no knowledge of any letters, I have no letters to my knowledge from Mr. Wagg.

Q. You don't know where it is?

Mr. BIDDISON: We object to that.

Mr. WRIGHTSMAN: It assumes that there was a letter.

Judge DALE: This book shows a letter.

Mr. WRIGHTSMAN: This witness don't know it.

Judge DALE: With reference to this piece of land. It is remarkable that a shoemaker does not remember——

A. Possibly if I would see the letter, I would know whether it was my handwriting.

The COURT:

Q. No, the question is, whether you got a letter from Mr. Wagg.

A. Not that I remember of. If there was something brought up to refresh my mind to it, I might remember, but I don't remember now of ever getting a letter.

164 Judge DALE:

Q. If you received a letter of that kind, is it lost?

Mr. BIDDISON: To which we object as hypothetical, and not the proper method of establishing the non-existence of the letter.

Mr. WRIGHTSMAN: And merely calling for a guess.

The COURT: Well, I don't think the objections are either one in form. I will overrule them.

Mr. BIDDISON: Exception.

Judge DALE:

Q. Answer the question.

A. What is the question?

Q. If you received a letter of that kind, is it lost? Do you know where it is?

A. I don't know nothing about it. I don't know that I ever did.

Judge DALE: That's all.

Cross-examination by Mr. WRIGHTSMAN:

Q. Have you any recollection of having ever received any letter or statement in writing from Mr. Wagg?

A. No sir.

Q. If you had received such a letter, you would probably remember it, would you not?

A. I would, likely, yes sir.

Mr. WRIGHTSMAN: That's all.

Judge DALE: Take the witness stand, Mr. Wagg.

S. R. WAGG, being produced as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Judge DALE:

Q. You were sworn in this case, I believe, this morning?

A. Yes sir.

The COURT: No, he has not been sworn.
Thereupon the witness was sworn.

Judge DALE:

Q. Mr. Wagg, examine this book, and state whether or not it is your copy book of letters you wrote?

165 A. That is my copy book.

Q. I will ask you to examine page 485, and state whether or not there appears there a copy of a letter written by you to Mr. Deem, the witness just on the stand?

Mr. BIDDISON: Objected to as calling for a conclusion, and irrelevant and immaterial.
The COURT: Overruled.
Mr. BIDDISON: Exception.

A. That is a letter written by me. I wrote the letter.

Judge DALE:

Q. Did you mail it?
A. I don't know.
Q. Do you think you did?
A. I couldn't tell you anything about it.
Q. Haven't any idea about it; is that it?
A. I don't know. I wrote the letter, but I couldn't tell you anything further about it.
Q. Can you tell now; have you any idea whether you mailed that letter, or not?
A. I can guess; the probability.
Q. Have you got the original of this letter in your possession at this time?
A. No, I have not.
Q. Do you know where it is?
A. No, I do not. I think I sent it to Roy Drown after I received it; I think I did. We would have been very glad to have sold that land to Mr. Deem at the time; I would.

Judge DALE: That is all. Cross-examine.
Mr. BIDDISON: I don't care to cross-examine.
Judge DALE: We now offer in evidence the copy of the letter.
Mr. BIDDISON: To which we object as incompetent, irrelevant and immaterial, and the proper foundation has not been laid..

166 The COURT: Objection overruled.
Mr. BIDDISON: Exception.

Thereupon Judge Dale read said letter as follows:

"APRIL 21ST, 1901.

W. E. Deem, Cleveland, Okla.

MY DEAR SIR: Your inquiry at hand. If you want to buy my land west of Cleveland see Leroy M. Drown of that city.

Yours,
S. R. WAGG."

Mr. Clark: The next I have is May 5, 1900.

The Court: Let's get on, gentlemen. We are making very slow progress.

Mr. Clark: This is a letter written May 15, 1900, by W. H. Herbert to S. R. Wagg, written from Newton, Kansas.

Thereupon Mr. Clark read the same, as follows, to wit:

"Newton, Kan., *May 5th,* 1900.

S. R. Wagg, Appleton, Wis.

My Dear Sir: I got your letter today, bringing me considerable relief. I am sure you have been imposed upon in regard to the land being advertised for taxes that accrued once before you had anything to do with it and while I lay sick, but not since. The day after you paid the taxes I went with the money to pay them but was told by the Treasurer that you had done so. I supposed it was to relieve me, knowing I was out of funds and had to borrow anyhow. The land was never advertised but once and that was before your loan. The slip has been cut out of an old paper for a malicious purpose and succeeded well. I may not be able to see you at
167 Clevland, but will see you later, and I hope make a fair and
just settlement. I am old and cannot afford to lose my home. If I should I might not be able to get another. My mining interest will pay all my indebtedness in a few weeks, I am sure, when settlements can be made between us, which will be more satisfactory to all than a foreclosure can possibly be.

Very truly, W. H. HERBERT."

Mr. Clark: The next I have is April 9, 1901, written by Mrs. Herbert to Mr. Wagg.

Thereupon Mr. Clark read the same as follows, to wit:

"Cleveland, Okla., *April 9th,* 1901.

Mr. S. R. Wagg, Appleton, Wis.

Dear Sir: If you will return those papers you sent here I will sign them and so get this matter settled immediately. I would have signed them at the time but did not get to see them on account of Mr. Drown being from home. There was a misunderstanding in regard to them. Mr. Drown said I could see them but in the meantime had to go away. I learned afterward they had been returned.

Respectfully, (Mrs.) W. H. HERBERT."

Mr. Clark: The next I have is May 16, 1901. This is simply an affidavit concerning the whereabouts of Mr. Herbert, that I think is attached to the plaintiff's petition.

The Court: Affidavit of Mrs. Herbert?

Mr. Clark: Affidavit of Mrs. Herbert concerning the absence of Mr. Herbert.

Thereupon Mr. Clark read the same as follows, to wit:

168 Territory of Oklahoma,
*County of Pawnee, ss:*

Mary B. Herbert, being duly sworn deposes and says:

Cleveland, Okla., *May* 16, 1901.

Mr. S. R. Wagg, Appleton, Wis.

Dear Sir: I can not obtain my husband's signature to the deed because I do not know where he is. There are several reasons why I believe he is dead, the principal one being because I have not heard from him since last November and he was not in good health. His habit was to write regularly to his family. Should he return I agree to have a new deed made to you with his signature. I have never given a title to my homestead or any part of it or appurtenances or signed any papers pertaining to it other than what the abstract shows. It is mutually understood that this statement is not to be recorded.

Respectfully, MARY B. HERBERT.

Affirmed and acknowledged before me this 28th day of May, A. D. 1901.

O. A. GILBERT,
*Notary Public.*

Term of May 14, 1904.

Mr. Clark: We have another affidavit to the same effect, sworn to on the 6th day of July, before another Notary Public.

Mr. Biddison: To a good deal more effect, too.

Mr. Clark: I will read it.

Thereupon Mr. Clark read the same as follows:

Territory of Oklahoma,
*County of Pawnee, ss:*

Mary B. Herbert, being duly sworn, on oath deposes and says that she is a resident of said county; that she was deeded the sole owner of the following described premises, located in said County and which was held by her as a homestead, to wit: The West 169 one-half (W. $\frac{1}{2}$) of the South East Quarter (S. E. $\frac{1}{4}$) of Section Eight (8) Township Twenty-one (21) North of Range Eight (8) East I. M.: That the same was free and clear of any incumbrance whatever except a mortgage to one S. R. Wagg of Appleton, Wis. That at her request for a settlement of said mortgage she has agreed to accept and has accepted in said land twenty-five (25) acres and has conveyed to said S. R. Wagg the balance thereof by deed in full satisfaction of said mortgage; that said deed was not signed by her husband W. H. Herbert, for the following reason: That she does not know where he now is, has not heard from his since November 1900, and believe him to be dead; that if he is not that she agrees to procure his signature to said conveyance to said S. R. Wagg as soon as he shall return. It is mutually understod that this instrument is not to be recorded unless absolutely necessary in order to effect a sale of the above described fifty-five (55) acres of land conveyed by me to said S. R. Wagg, or circumstances arise which shall make necessary the recording of this instrument in order to perfect the said S. R. Wagg's title to said land.

MARY B. HERBERT.

Affirmed and subscribed to before me a notary public in and for the Territory and County aforementioned, this 6th day of July A. D. 1901.

L. M. DROWN,
*Notary Public.*

My Commission expires June 29th, 1905.

Mr. Clark: Also another affidavit—— No, a receipt given by Leroy Drown, dated June 27, 1901, to Mrs. Herbert, for the affidavit.

Thereupon Mr. Clark read the same as follows, to wit:

170 Cleveland, Okla., *June* 27," 1901.

I, Leroy M. Drown, have received from Mrs. Mary B. Herbert a statement to S. R. Wagg of Appleton, Wis. regarding some land recently sold by her to the said S. R. Wagg.

I agree to hold the same in trust and in case Mr. Wagg requests delivery of said statement, I will consult with said Mrs. Herbert regarding same and agree not to deliver same unless it shall appear actually necessary to do so in order to perfect title of said S. R. Wagg, or prove necessary to make sale of said land. I further agree to protect said Mrs. Herbert's interests in this matter the same as my own.

LEROY M. DROWN.

Mr. Clark: That is all I have, I guess.

Judge Dale: Now, a letter from Mr. Wagg to Mr. Drown, bearing date May 10, 1901.

Thereupon Judge Dale read the same, as follows:

S. R. Wagg, Appleton, Wis.

May 10*th*, 1901.

Leroy M. Drown, Cleveland, Oklahoma.

My Dear Sir: I enclose you the Herbert deed to me — my deed to her, & contract to you. You sign both contracts & return me one properly signed before notary.

Now in Herbert matter after consultation with your father, I concent to 25 acres provided Mrs. Herbert make a street from our land on the west side to the Highway south of us upon the land deeded to her by me unless the adjoining interests west of her give half the right of way, but any way get the outlet to the south highway.

2nd Have a sworn statement made by Mrs. Herbert that to her best knowledge & belief Mr. Herbert is dead, before witnesses
171 and notary all in legal form & immediately on signing file both instruments for record.

Also take her sworn statement concerning the Wm. L. Eagleton claim to the house near the store and anything else you think of, get them all up & have them put at rest by an instrument in writing that cant be repudiated, all finished & signed before any delivery of deed or release of mortgage & I hope this will close the case. My legal claims now come near $1400 against the lot & we must figure it out now to make it. I had talk with your father about platting & he thinks they will double up the taxes on a plat. Now I suggest to plat as we want but not to record now, but rather deed carefully by meets & bounds from our east line. I am not fully decided, but know the nice convenient way is to the plat & deed by block & number. We can plat 5 acres say?"

Judge DALE: The balance of that relates to some other matter. On May 12, 1901, from Mr. Wagg to Mr. Roy Drown.

Thereupon Judge Dale read the same as follows, to wit:

"MAY 12th, 1901.

DEAR ROY: Before surrendering mortgage lease & note to Mrs. Herbert, please learn from a reliable lawyer after explaining to him the transaction & conditions fully, whether or not the mortgage ought to be foreclosed to be strictly and fully legal.

The COURT: That was read, Judge, by Mr. Clark.

Mr. CLARK: That was read before and withdrawn. We offer it again at this time.

The COURT: Very well, go ahead.

Judge DALE: Well, it is considered in. Now on May 20, 1901, the same parties, from Mr. Wagg to Mr. Drown.

Thereupon Judge Dale read the same as follows, to wit:

172 S. R. Wagg, Appleton, Wis.

MAY 20*th*, 1901.

MY DEAR ROY: I have back the deed duly re-recorded. Now you have the affidavit of W. T. Litton duly recorded in same book making reference to the same re-recording of deed etc & pay him & chg me.

Now you see there is no intervening interest between 1st & 2nd corrected date & its good as can be now. I should have told you at the beginning to consult a safe lawyer in our interest, about foreclosing mortgage in the regular way with Mrs. Herbert's cooperation in the same & the settlement of the matter in the manner our exchange of deeds indicate & not much of any legal expense attached to it all before any delivery of the deed to Mrs. Herbert & this would bind all with chains of adamant no legal scoundrel could attack.

Yours, S. R. WAGG.

Judge DALE: Here is one of May 22nd from Mr. Wagg to Mr. Roy Drown.

Mr. CLARK: What year?

Judge DALE: 1901.

Thereupon Judge Dale read the same as follows, to wit:

S. R. Wagg, Appleton, Wis.

May 22*nd,* 1901.

Dear Roy: Your favor of 17th at hand. All right Mrs. Herbert can sign or not as she pleases. She told your father she believed him dead. I make no promises at all. I have good deed on record, what more is necessary? And you can return the papers at once."

Judge Dale: That is all of that that refers to this matter. Now on June 3, 1901, from Mr. Wagg to Mr. Leroy M. Drown.

173 Thereupon Judge Dale read the same as follows, to wit:

S. R. Wagg, Appleton, Wis.

June 3*rd,* 1901.

Leroy M. Drown, Cleveland, Oklahoma.

My Dear Sir: Yours of 29th at hand. The instrument of Mrs. Herbert is no affidavit. Simply a letter & has no reference to anything. Am surprised you should be taken in on a business matter of this importance.

I have had written out an affidavit in proper form which you will have Mrs. Herbert sign & then return to me.

I do not want to record or use it unless some one shall question the deed, then I can have it to show what our agreement was.

I do not expect it will ever be necessary to show it & I have disposition to do so.

Please get her signature before notary & return to me.

S. R. WAGG.

Judge Dale: June 15, 1901, from Mr. Wagg to Mr. L. M. Drown. Thereupon Judge Dale read the same as follows, to wit:

S. R. Wagg, Appleton, Wis.

June 15*th,* 1901.

L. M. Drown, Cleveland.

My Dear Sir: I return to you the land contract for you to sign before a notary on back side as there provided.

I return to you the affidavit for Mrs. Herbert to sign or refuse to sign & ask that you present the same with my demands for her signature & to return her refusal if the same is given & 174 you may say this is the simplest way for her to meet the requirements & in case Mr. Herbert never returns it shall be treated in strict confidence other than for legitimate uses, & not be recorded. The letter sent me is not an affidavit, but to give said letter effect requires an affidavit from me and you to give it effect & further I never agreed to keep same confidential.

On her refusal to sign I know exactly what to do & shall do it without one hour's delay.

Yours truly,
S. R. WAGG.

Judge Dale: On July 6, 1901, from Mr. Wagg to Mr. Drown. Thereupon Judge Dale read the same as follows, to wit:

S. R. Wagg, Appleton, Wis.

July *6th*, 1901.

Leroy M. Drown, Cleveland, Oklahoma.

My Dear Roy: Yours of the 27th at hand & noted I have nothing to say in favor of loans at this time. Mrs. Herbert will convert anything short of a dunce on Oklahoma loans & my anticipations of her hypocracy & fraudulent agreements are fully realized & unless she signs the affidavit by July 13th her letter goes on record, but of this you say nothing to her, with affidavit of your father etc. as to the facts in the case.

Nobody could get a loan quicker than yourself & your honesty is not in question, but I dont intend to again give any advantages to O. T.

In surveying & platting make complete survey, then from this original copy what we want to record, & when its desired again copy more & record it. You must record a tracing cloth copy in ink, I think, for recorders use to file. Send me blue print.

Yours, S. R. WAGG.

175 Judge Dale: July 12, 1901, from Mr. Wagg to Mr. Drown.

Thereupon Judge Dale read the same as follows, to wit:

S. R. Wagg, Appleton, Wis.

July 12th, 1901.

L. M. Drown, Cleveland, Okla.

My Dear Sir: Your letter with Mrs. Herbert's affidavit. You have no doubt done with Mrs. H. all you could to repair the mistake of giving her the executed papers from me with out getting in return the affidavit asked from her. She now takes advantage of this fact or thinks she has or can do something nobody knows what—this violating her written pledge of agreement I want to remind you & her that neither jointly or severally can you or she properly make an agreement to keep papers executed for me, without my concent thereto & I have not concented. I want the affidavit as made & presented, it being only what was originally agreed upon.

There is a remedy for Mrs. H. yet & she will not relish it if applied. Her action is pure cussedness.

Your statement regarding fence came today, plat, etc. All satisfactory, except so far as it appears I am made to pay ½ for Mrs. Herbert's fence.

Now I shall not furnish her any fence or give any concent for you to do so. I want you to demand from her full pay't for her part & if she don't pay take fence up & use the law to compel her to build it if there is any law.

The demand is she pay for, or herself build a lawful fence & I shan't change the requirement. I want no favor of whatever kind shown her H when my interest appears, & I much regret ever giving her enough land to stand one foot. I *never* mutually agreed *not*

to record her letter send as substitute for affidavit. As to
176 loans I am using all the funds I have to pay my notes.

I remain,

Yours very truly, S. R. WAGG.

Judge Dale: That is July 12, 1901. Here is July 22, 1901 from Mr. Wagg to Mr. Drown.

Thereupon Judge Dale read the same as follows:

S. R. Wagg, Appleton, Wis.

July 22nd, 1901.

L. M. Drown, Cleveland, Okla.

My Dear Roy: Yours of the 16th came to hand & is noted. I think you place too broad a view on mine of the 12th as before said your integrity is not in question & never has been, & only yourself give it this form.

The Herbert deal in my opinion was conceived in deceit & I regret you were ever drawn into it. The pretended Pawnee purchaser prefaced his suggestion to purchase with stating, "If could give him a satisfactory title, etc." and I believe he was only setting trap to get something. Certainly this sort of folks have changed my intentions regarding Oklahoma business amazingly & I do not think it will easily change back. Now to be specific as to the point at issue its a question affecting, "*title*." You say you are equally interested in said title with the writer? Granted. But the writer is only satisfied with a title that's beyond any question, & the only chiding the writer ever offered was your delivery of the papers without the affidavit I required & when your local att'y could not provide it, you should written back to me for it, but instead you delivered & took
Mrs. H. letter as a substitute, & when a proper affidavit
177 was presented the appreciation and gratitude of the party who
had profited by your intercession & labor on their behalf refused to execute what they had agreed on a prior occasion to do.

Now for said beneficiary to intimate as you state her belief I would take any advantage is cheap, & worthy of her for the deed recently given brands the falsity of her declaration & I never for a day thought to deprive her of home & shelter & a good bit of land be the conditions what they might. Common honor would prompt a beneficiary of my clemency & your solicitude to relie- *you* of any embarrassments by promptly signing an affidavit, that she had agreed to execute.

You can quite safely charge up the whole matter to Mrs. H. & Okla. att'ys etc. Nothing else.

Yes, I will sell my half out to you in the land. What will you give?"

Judge Dale: That is all of that with reference to that matter. We have a number of letters from Mr. Wagg to Mr. Drown, one bearing date November 12, 1901, and one bearing date the same day—two others bearing the same date—three letters, each bearing date November 12, 1901. They refer to attacks being made upon the title, and are in line—pages 303, 305 and 325; also a letter on page 412. I will read the letter of November 23, 1901——

Mr. Biddison: We object to those, except that they go in. I don't want to take pot shots at these matters. If there is anything to go in, I want it to go in, so I can make my objections to them.

Judge Dale: All right, sir, I will read them. Page 303, November 12, 1901, to Leroy M. Drown, Cleveland, O. T.

Thereupon Judge Dale read the same, as follows, to wit:

178 "Nov. 12th, 1901.

*Say Nothing Now.*

Leroy M. Drown, Cleveland, O. T.

D'r Sir: Yours of the 8th at hand regarding title etc.

You ask me what you shall do—do as I told you long ago. Record the affidavit Mrs. Herbert executed & gave you.

The Power of att'y given you by S. R. and Sarah M. Wagg to give title & deeds in Solomon R. Wagg's addition to Cleveland, O. T. is hereby suspended until further notice & settlement of matters of title if any are raised.

Sell no more lots. (Wait a raise.)

When Mrs. Herbert's affidavit is recorded & mailed to me I will tell you what to do.

Yours, S. R. WAGG.

S. R. Wagg, Appleton, Wis.

Nov. 12th, 1901.

L. M. Drown, Cleveland, Oklahoma.

Dear Sir: Since writing you I have seen Clark and he says do not record Mrs. Herberts's affidavit and to keep still & pay no attention to any gossip. I have a clean straight deed from Mrs. & Mr. Herbert.

No successful attact in my opinion can be made upon it. Your father—you—Litten & myself know & can swear the deed was given to save foreclosure expense in case mortgage contract was not kept. I am in peaceable possession for 3 or 4 yrs. paid taxes. Any common dunce can question title—can question your title to your coat, or hat, or store, or land, but what's he going to do?
179 What's Herbert going to do?
He's signed my deed of record & also Its in my safe. He run away, his wife made affidavits she believed him dead, & wrote me at least 2 letters to that effect, also stated the mental worry was affecting her health, wanted me to settle up so she could have her place what there was clear.

What does Broaddus say to your question to him? Wherein my deed on its face is a m't'g? Suppose Mrs. Herbert's deed to me was set aside. What next? It falls back on the first of the 80 & Mrs. Herbert would lose her 25 acres & my title to the whole 80 would be upheld.

I think & Clark says it's so & Mrs. Herbert is in dangerous business if she is a party to anything of the kind. A man who runs away don't have much show in court. I would have a 1st class case of conspiracy to defraud if anything was tryed by either of them like attacting my title.

Will write you again.

Yours, S. R. WAGG.

Judge Dale: Now, on November 18th, 1901, Mr. Wagg to L. M. Drown.

Thereupon Judge Dale read the same as follows, to wit:

S. R. Wagg, Appleton, Wis.

Nov. 18th, 1901.

L. M. Drown, Cleveland, O. T.

Dear Sir: Yours 14th at hand 14th. At this time *don't* go to Herbert. Say to Mrs. Herbert—Now Mr. Herbert is *not* dead,
180 I (you) as an interested party in this land want your (Mrs. H.) agreement carried out & in this way she defends my title as she has agreed to do by getting Herbert's signature as she agreed, (when she supposed him dead) if found living.

(H's rights at best only last during life.)

Make a quit claim deed have her sign it & send Herbert with request he sign it. Show no concern & if questioned about me say I say title is good enough for me, but you are the one asking it.

Test her honor & sincerity.

Yours, S. R. W.

Judge Dale: Now I will read a letter from Mr. L. M. Drown to Mr. Wagg, bearing date November 23, 1901, purporting to have been written from Cleveland, Oklahoma.

Thereupon Judge Dale read the same, as follows, to wit.

J. A. Burkholder, Pres.; O. M. Lancaster, V. Pres.; D. B. Holler, Ass't Cashier; L. M. Drown, Cashier.

Directors:
J. A. Burkholder.
G. M. Weems.
O. M. Lancaster.
Preentiss Price.
L. M. Drown.
Frank Hudson.
C. C. Burkholder.

The Triangle Bank.

Paid Up Capital, $7,000.00.

Cleveland, Oklahoma, *Nov.* 23", 1901.

Dear Mr. Wagg: I enclose herewith letter from Mr. Broaddus regarding your deed in escrow. He sends also copy which I attach.

I returned yesterday from my trip to Northern Arkansas. Could not find Mr. Herbert. I was positive that if I could find him I could get a Quit Claim Deed from him and thus settle all possibility of any future difficulty. Could I have found him it would also have given me an opportunity to have determined his exact position and intentions in the matter. I will write to Mr. Litten today and know he will make a statement that will be what you want.

181 You can have Mr. Clark make affidavits for the father and mother to sign and as father talked the matter over with you you will know without further information what to put in affidavit. I expect if the time were counted up in which I listened to Mrs. Herbert's troubles and requests to use my influence with you to get the settlement she wanted, it would not fall much short of a week. If an affidavit from me, who was at that time acting as a friend of you both, would prove of any service I would gladly make one.

I would rather have Mr. Clark's opinion on the point involved than all the lawyers in Pawnee put together as he has every opportunity to know all the law, and is much more capable than they.

In order to get that affidavit from Mrs. Herbert I had to bind myself not to record it without first seeing her. You send me a statement that you will not record her affidavit without my consent and that will let me out. You will have no trouble getting my consent if it needs recording.

Our directors meet Monday and I am going to look after your stock and get you elected a Director if possible. I believe that by watching our chances and whenever a stockholder gets hard up offering him par for his stock that we can have a controlling interest in two or three years. The bank is getting a good footing with the people and we are offered more *good loans* than we have money to handle. I will send you some of our new cards when issued showing your connection with the Bank.

Don't you think it would be a good idea not to offer over 5% interest on deposits from up there? That must be about twice as much as Northern Banks offer. We don't want to make interest rate so high they will be afraid of us.

I made a fellow a cash offer of $200.00 on some business lots here. He wanted $250.00. Its a money maker any way and in case Railroad comes its a big money maker. If agreeable and you want
182 to furnish that amount on a ½ interest in profits, I will draw on you for $200.00. If Will has about $275.00 he wants to invest I can get a good corner—right across from 1st National Bank 100 ft. by 50 ft. It will never be worth less. A Rail Road will make it worth from $600.00 to $1000.00. Will handle it same way for him or yourself.

Yours as ever L. M. DROWN.

The trip to Arkansas cost me $20.60. You didn't ask me to make it but I knew a Quit Claim deed would make us all feel much better. you can use your own pleasure as to whether you wish to stand ½ expense or not. Please let me know.

L. M. D.

Judge **Dale**: Here is another letter from Mr. Drown to Mr. Wagg. Thereupon Judge Dale read the same, as follows:

J. A. Burkholder, Pres.; O. M. Lancaster, V. Pres.; D. B. Holler,
As't Cashier; L. M. Drown, Cashier.

Directors:

J. A. Burkholder.
G. M. Weems.
O. M. Lancaster.
Prentiss Price.
L. M. Drown.
Frank Hudson.
C. C. Burkholder.

The Triangle Bank,

Paid up Capital, $7,000.00.

Cleveland, Oklahoma, *Nov.* 7″ 1901.

Dear Mr. Wagg: I enclose herewith 2 contracts

| | |
|---|---|
| W. A. Dawson | $45.00 |
| T. J. Gibson | 45.00 |

I enclose herewith a letter which I received from T. M. Broaddus, Register of Deeds, regarding your title. You will see what his reply is. I have written him to day asking what evidence your Deed from Herbert and his wife bears of being a real estate mortgage.

Were I in your place I would not commence any action
183 against Eagleton until we either get a quit claim from Herbert
or have the title quieted in *court*. I think you will see the advisability of doing this as Eagleton might possibly hinder the matter some or perhaps get into communication with Herbert and make you more trouble than your damage suit amounts to.

There is considerable more Rail Road talk now and I would like if there is anything more needs doing regarding the title to have it finished before a Rail Road comes and the land becomes of enough value to make it an object for some lawyer to encourage Herbert to make trouble—if such a thing is possible.

Please return Mr. Broaddus' letter to me and advise me what steps you think best to take in the matter.

Yours as ever L. M. DROWN.

Judge Dale: And here at the bottom is noted in blue pencil: "Suspended Power of att'y Nov. 12th, 1901."

Judge Dale: Here is a letter, Mr. Biddison, of November 25 1902, with reference to the sale of a lot of lots there, and in this connection perhaps it is not necessary to read it; we may take occasion to read it later.

Judge Dale: November 8, 1901, from Mr. Drown to Mr. Wagg. Thereupon Judge Dale read the same as follows, to wit:

"DEAR Mr. WAGG: There is going to be a sharp advance here in real estate, before a great many people realize it——

Mr. BIDDISON: We object to this as entirely immaterial and irrelevant. Here is a letter long after the whole transaction; here is a friend writing to his friend, suggesting investments in that section of the country, long after this last settlement is made, and can have no possible connection with it.

184 Judge DALE: It throws considerable light on the manner in which they thought they were dealing with this woman; all these letters do; they show they knew they were taking advantage of her, is my understanding.

The COURT: Proceed. Objection overruled.

Mr. BIDDISON: Exception.

Thereupon Judge Dale continued to read from said letter: "I am not pushing our lots now. We might as well get the benefit of the raise on them as to give it to some one else. I can handle this in my own name, and notify you of each transaction."

Judge DALE: That is all I care to read of that. Here is a statement made September 5, 1902, with reference to lot sales, etc. I don't care to introduce that now, but we may want it in rebuttal. I offer in evidence the letter bearing date November 7, 1901, and also the letter of November 23, 1901.

Referring to the letters of those dates read by Judge Dale.

Judge DALE: If the court please, we will now offer some parol testimony; and we would like, if the court will, to have the rule enforced among these various witnesses. We have but a few on our side. We would like to invoke the rule for the separation of the witnesses, for the absence of the witnesses from the court room during the examination.

Mr. CONLEY: There are a large number of these witnesses, if the court please, that are defendants. I suppose they would have a right to remain here.

Judge DALE: They are not defendants in the case we are trying now.

Mr. CONLEY: They are the various lot owners.

Judge DALE: They are not in this case at this time, except indirectly, and their presence will not be needed at this time; and they could not be used at this time.

185 The COURT: Why, if it can serve any good purpose I can make the rule. From the letters introduced, I can't see that there would be very many persons who would have knowledge of the transaction.

Judge DALE: As to the values of the land.

The COURT: Who are your witnesses? Let them stand up and let me see who they are.

Judge DALE: I have but two or three in the court room, outside of Mrs. Herbert. I understood that Mr. Wagg had subpœnaed one hundred and ten witnesses. I don't know what the purpose of them is.

Mr. WRIGHTSMAN: The gentleman will find out if he goes ahead and makes his case. They are here in the court room, and around at the hotels and livery stables.

The Court: I can't see how it will be necessary to have so many witnesses.

Judge Dale: There has been a general practice in court on the question of value to limit the number of witnesses to about five.

The Court: If there is any rule of court——

Mr. Biddison: There is no rule of court, but the general rule has been six. I think counsel has done that by a kind of general understanding. I think that has been the general rule here ever since Judge Bierer was on the bench.

The Court: There are so many of these parties that are litigants themselves.

Judge Dale: I was advised that they had been subpœnaed by Mr. Wagg.

Mr. Biddison: I might suggest to Your Honor that I represent Mr. Wagg, and there has been no excessive number of witnesses. All told, the witnesses subpœnaed by Mr. Wagg and Mr. Drown in this case won't exceed fifteen, I don't think. There are a number
of lot holders here to present their propositions, but they are
186 subpœnaed as witnesses by Mr. Wagg or Mr. Drown. There
are some other subpœnaed witnesses for the other defendants that I don't represent.

The Court: Well, go ahead, I will not make any rule in the case, except as to the number, five on a side, as to value, or as to any one given proposition.

W. T. Litten, being produced and sworn as a witness on behalf of the plaintiff, testified as follows:

Judge Dale: The introduction of this particular witness at this time, if the court please, is out of order. He desired very much to get home this evening, and we thought we would accommodate him.

The Court: Proceed.

Judge Dale:

Q. You may state your name to the court.
A. W. T. Litten.
Q. Where do you live, Mr. Litten?
A. I live at Blackburn now.
Q. Did you ever live in the city of Cleveland?
A. Yes sir.
Q. For what time?
A. About seven years.
Q. Beginning what time?
A. The spring of 1904-1894.
Q. When did you leave that city?
A. July, 1900.
Q. 1900 or 1901?
A. July 1900, I believe.
Q. Were you acquainted with the tract of land known as the

Herbert-Wagg tract, lying immediately west of the town of Cleveland?

A. Yes sir.

187 Q. How far do you live now, how far is your residence now from the town of Cleveland?

A. The way we have to travel, we call it about fifteen miles.

Q. Will you tell the court—or, were you living in Cleveland at the time that townsite was organized there?

A. Not at the time it was organized. I came there the following spring, or a few months afterwards.

Q. Mr. Litten, how was the town of Cleveland laid out, how much land was laid out for that townsite?

A. I think eighty acres.

Q. How does this tract in controversy, known as the Herbert-Wagg, lie, with reference to the 80 acre tract upon which the town of Cleveland was originally located?

A. Lies north and south, and on the west side of it; parallels it.

Q. This eighty-acre tract in controversy in this case is the west half of the southe-st quarter of section eight, is it not?

A. Well, I couldn't remember those figures. I presume that is correct, but not having any data, I couldn't say.

Q. Mr. Litten, assuming that this is the eighty-acre tract, the Herbert land, did the town of Cleveland lie on the eighty immediately east?

A. Yes sir.

Q. And this Herbert tract adjoined that on the west?

A. Yes sir.

Q. What was the character of this land, this Herbert land?

A. Well, it is about the best land, except the bottom land, that there is in the township.

Q. How does it lie with reference to the town, is it slightly above on an average, or below it, or how?

188 A. About on a level. The northwestern part of it, I think, is said to be a little above the original townsite of Cleveland, and the southern part of it is somewhat lower.

Q. About how large a place, in population, was Cleveland at the time you left there?

A. We estimated it to be about five hundred.

Q. Now, how was the land which lies to the east and to the south and to the north, for residence purposes, compared to this Herbert tract of land?

A. The land that lays to the east of what?

Q. Of old Cleveland, the old eighty?

A. Well, there is no comparison at all.

Q. Why?

A. Well, it is not a desirable side of the town to live on. It is a rough piece of land, and all the tendency of the town was to go west and south apparently.

Q. The tendency of the town was to go over to the Wagg eighty? The Herbert eighty?

A. Yes sir.

Q. Did I ask you what your business was while you were in Cleveland?

A. I think not.

Q. What was it?

A. I was cashier in a bank.

Q. Were you acquainted with the values of land in and about the town of Cleveland during the time you resided there, and for a year subsequent to that time?

A. I think I was during the time I resided there. As to whether I was after I left there, would be a matter of judgment, I reckon.

Q. Now, Mr. Litten, do you think the prices of lands decreased or increased after you left?

189 A. They increased.

Q. Now, at the time you were there, just about the time you left there in the spring of 1900, I will ask you what, in your judgment, was the reasonable market value of the eighty-acre Herbert tract of land, taking into consideration its uses for any purpose for which it might have been used, either for agricultural or townsite purposes, the purpose for which it would best sell, that it was best adapted to; what, in your judgment, was the best reasonable acre value of that land at that time?

Mr. Biddison: To which we object, at that time, as irrelevant and immaterial, the competency of the witness is not shown, and the value of the land at the time inquired about is entirely immaterial in the case.

Judge Dale: Well, the witness has testified it increased from the time he left there, and I am asking now the time he left there, so that they could not be prejudiced by that at all.

The Court: What was the date of the second deed?

Mr. Biddison: May 28, 1901.

The Court: And the mortgage was executed in 1898?

Judge Dale: The first mortgage.

The Court: Objection overruled.

Mr. Biddison: Exception.

Judge Dale:

Q. You may answer the question; what was the acre value in your judgment, for any purpose for which it was adapted.

A. The question is, what it was worth, in my judgment, when I left there?

Q. Yes, sir.

The Court:

Q. What would it have sold for on the market.

Judge Dale:

Q. What was the reasonable market value of the land?

A. Well, I would say about a hundred dollars an acre.

190 Q. Now, in your judgment, was it worth more or less in the spring of 1901, during the month of May, than it was worth in the spring of 1900?

A. It would be worth more, according to the circumstances surrounding it, would be my judgment.

Q. About how much more do you think it was worth in the spring of 1901 than in 1902—1900 than in 1901?

Mr. Biddison: Objected to, for the reason that the competency of the witness is not shown, irrelevant and immaterial.

The Court: Well, as to the question of the competency of the witness, I will sustain the objection, unless it is shown that he kept advised.

Judge Dale:

Q. Mr. Litten, were you over to Cleveland frequently or infrequently for about one year after you left there?

A. I can't say whether I was there very frequently or not. I was down some three or four times, I think, during the year. I think that was the year, if I am not mistaken, that there was some railroad talk, and we were visiting back and forth.

Q. Did the town of Cleveland grow in population from the spring of 1900 to 1901?

A. I wouldn't say; I didn't reside there.

Q. Did you notice whether it increased in its buildings or not?

A. I think but very little. It increased somewhat in value, the property, but very little in buildings, if I remember.

Judge Dale: Cross-examine.

Cross-examination by Mr. Biddison:

Q. In what way had it increased in value, Mr. Litten?

A. By reason of the almost decided decision of the railroad company to build the railroad down through there.

191 Q. When was the proposition decided and given out, that it was understood in that country, that the railroad was going to build there?

A. I don't think it was decided, if I remember right, until about March, 1902, if I remember right, was the last letter I had from Mr. Finney, when he told me he had decided to take the Cleveland line.

Q. As a matter of fact, was there anything definite in the spring of 1901 at all.

A. In the spring it was not very definite, but we understood that there was enough money in Jennings, Cleveland and Hominy to carry it down there, and we gave it up, the Blackburn folks gave it up in the spring of 1901.

Q. Where had you been from the spring of 1900 to the spring of 1901?

A. At Blackburn.

Q. All that time?

A. From the Spring of 1900?

Q. Yes.

A. I remained in Cleveland until July, 1900.

Q. Where did you go then?

A. I went east and remained until about November, and came to Blackburn in January, but I again went to Cleveland before going to Blackburn.

Q. The land in controversy, in your judgment, in the spring of 1900 was worth one hundred dollars per acre?

A. Yes, sir.

Q. How long had it been worth that value, in your judgment?

A. For farming purposes I think it was as good as any land I ever saw that has sold for a hundred dollars an acre, and I came from a section of the country where rock piles and shelly 192 regions sold for that amount of money, and that is worth more.

Q. Where was that land you are comparing it with?

A. Eastern part of Ohio.

Q. You think this land was worth more than that land back there.

A. For agricultural purposes, yes, sir.

Q. How far from a railroad was this at that time?

A. Pawnee, I think, was our closest road.

Q. Was there a railroad in Pawnee at that time?

A. I am not sure, but I think so.

Q. Well, do you know whether it was or not?

A. Let me think a minute and I can tell you. Yes, sir, there was. I came to Pawnee on the railroad.

Q. In the spring of 1901?

A. Yes sir.

Q. Well, in the spring of 1900, when you testified that this land was worth a hundred dollars an acre, was there a railroad in Pawnee?

A. I couldn't say.

The COURT: Well, that is so remote, anyway.

**Mr. BIDDISON:**

Q. Had that land been increasing or decreasing in value for some time prior to the spring of 1900?

A. I should think it had been increasing, from the fact that a great many people wanted it.

Q. How much, in your judgment, had it been increasing, to what extent?

A. Well, I don't know. It would be a matter of opinion. Land had sold in that community all the way from forty-five to sixty dollars an acre, and had been selling for that up around Blackburn the same class of land, prior to that time.

Q. About what, in your judgment, was that land worth at the time the mortgage was made.

193 Judge DALE: Objected to as immaterial and irrelevant.

The COURT: It goes to test his knowledge. He may answer.

Mr. BIDDISON:

Q. What was it worth at the time the mortgage was made?

Judge DALE: In 1898.

A. The market value of land about that time, the same class of land, was about forty to fifty dollars an acre; something like that.

Mr. BIDDISON:

Q. Do you recollect what your opinion on the value of this land was at that time?
A. I don't know that I gave any at that time.
Q. Do you know what your opinion was at that time on the value?
A. Yes sir.
Q. I will ask you if you wrote Mr. Wagg your opinion on the value of that land about the time this mortgage was made?
A. I expect I did.
Q. I will ask you to examine this letter.

Here Mr. Biddison hands the witness a letter.

Q. Did you write that letter?
A. Yes, sir.

Mr. BIDDISON: We offer it in evidence.
Judge DALE: Let the witness look at it.
Mr. Biddison hands the letter back to the witness.
Mr. BIDDISON: We offer it in evidence.

A. That is correct; it does not change my opinion at all.

Judge DALE: I would like to have it read, that part that you want to offer.
Thereupon Mr. Biddison read the same as follows:

G. W. Sutton, President. James Bigheart, Vice Prest.
W. T. Litten, Cashier.
Bank of Cleveland.
Incorporated 1895.
194 Capital Stock, $25,000.00.

CLEVELAND, O. T., *Jul.* 9, 1898.

S. R. Bragg, Esq., Appleton, Wis.

DR. SIR: Replying to your favor of the 4th regarding the land you refer to, will say that upon careful consideration I would say that the land in question would be good security for $1000. The farm joining on the North is now carrying $1600 and consists of 120 acres.

I should say for farming purposes any of this land is easily worth $25.00 per acre, and should we be fortunate enough to get a R. R. through here it would then easily be worth $50 to $75 per acre.

As to the owners *carater* &c. I scarcely know how to answer.

He is now and has been for three or four yrs a man of leisure, he is a Physician but does not practice, in short he does nothing whatever and should you make him a loan It is my opinion you will get the land sooner or later.

There is now about $600 on this land part of same nearly $200. held by us, the Balance by the 'Arkansas Valley Bk" of Pawnee, O. T. The owner's name is W. H. Herbert, or rather the land is in his wife's name. I hope I have answered you in full and beg to be at your service.

Yours &c., W. T. LITTEN, *Csh.*"

The COURT: Anything further from this witness?

Mr. BIDDISON:

Q. You say lands in the vicinity of Cleveland about that time were selling for fifty and sixty dollars an acre?

195 No, I didn't say fifty and sixty. I said forty to fifty; forty to forty-five; along there; that is my recollection of it, sir.

Q. You were acquainted with the value, and sales of lands in the vicinity of and adjoining Cleveland about that time?

A. I remember some offers that were made, yes, sir.

Q. Do you recollect the sale of the Sam Kinney tract, immediately north of this tract, immediately north of Cleveland townsite, and north of the Herbert tract, selling in 1900?

A. That was sold after I left there. I know nothing about it.

Q. In the fall of 1900 you had gone away from there?

A. I had gone away.

Q. You don't know what that sold for?

A. No, sir.

Q. Do you know what the Loterette eighty acres, joining the town of Cleveland on the northeast, sold for in the spring of 1899?

A. I don't remember. I know what I could have bought it for at one time.

Q. Do you know what the Powell tract, at the southeast of Cleveland sold for about that time?

A. That sold after I left.

Q. You don't call to mind any of these adjoining tracts of land, immediately joining Cleveland, or this tract in controversy, selling at or about that time?

A. No, I said I remember what they were offered for, and what they were put on the market at.

Q. You don't know of any of them selling at that price, though?

A. They didn't sell, no, sir.

Q. Do you know of the sales of any land in that vicinity, other than bottom lands, about that time?

A. No, sir.

Q. Anywhere in that vicinity?

A. There was a Jordan tract sold just east of the Herbert land—

I mean west of the Herbert land, but I don't remember what
196 it brought. It was sold under mortgage, I think.

Mr. **Biddison**: That's all.
Judge **Dale**: That is all, Mr. Litten.

Mrs. **Mary B. Herbert**, Plaintiff, being produced and sworn as a witness in her own behalf, testified as follows:

Direct-examination by Mr. **Clark**:

Q. State your name.
A. Mary B. Herbert.
Q. You are the plaintiff in this action?
A. Yes sir.
Q. You reside on the south twenty-five acres of the eighty acre tract involved in this litigation?
A. I do.
Q. And have resided there since shortly after the opening of this country?
A. I have.
Q. I will ask you, Mrs. Herbert, at the time these negotiations for the giving of this land deed were opened up, about the time your husband left Cleveland, what your business experience had been, whether or not you had conducted the business, or your husband had conducted it for the family?

Mr. **Biddison**: Objected to as irrelevant.
The **Court**: Overruled.
Mr. **Biddison**: Exception.

The **Court**:

Q. Answer the question.
A. Why, I was entirely inexperienced in business matters. I never had transacted any business; my husband had always attended to it. If I understand your question, it was up to that time.

197 Mr. **Clark**:

Q. Yes.
A. And previous to that my father had always in my girlhood time; I never had any business experience.
Q. Now, Mrs. Herbert, in reference to the transactions had at the time of giving this mortgage and the deed referred to as the escrow deed, I will ask you what you understood to be the terms of the escrow under which that deed was left in the bank?
Mr. **Biddison**: Objected to as irrelevant and immaterial; it does not appear that she transacted the business; and calling for a conclusion that is incompetent, irrelevant and immaterial.
Mr. **Clark**: I understand that is one of the very points that they make, is the only reason that I referred back to that occasion.
The **Court**: Well, you have introduced your evidence already as to what the terms of the escrow were, based on the correspondence.

Mr. CLARK:

Q. Now, Mrs. Herbert, referring to the time when the first interest became due, after the lapse of one year, referred to in this correspondence, I will ask you to state whether or not you remember the circumstances of Mr. Wagg coming to Cleveland, and coming to see you in reference to this matter?

A. I do.

Q. Did he come down to your house to see you?

A. He did.

Q. I will ask you to state just what occurred upon the visit of Mr. Wagg to Cleveland at that time, between yourself, Mr. Wagg and the Drowns?

A. I don't know what time Mr. Wagg arrived in Cleveland, but they called at my home, he and Mr. L. M. Drown and Mr. R. J. Inge, as near as I can recollect, between the hours of five and six o'clock; it may possibly have been a little after six; I don't know as to that.

198 Q. What conversations were had at that time with them concerning the land, concerning taking possession of the land, or the hay that was on the land; any conversation that was had at that time relate it.

A. Well, he asked me if I wanted to retain my home, and I said that I did, and referred to Mr. Herbert's illness as being the reason why we had not been able to meet the indebtness; as I understood then that he was claiming was the indebtedness; and he said something in regard to his taxes and interest; and I said that referred to the same; and he claimed to own the land, and said that some one at Pawnee had asked him what he was going to do with his land down at Cleveland, and he said that he had placed the deed on record, the trust deed on record, and that it was now his land; that it was all conveyed to him; and gave me to understand——

Mr. WRIGHTSMAN: Wait a minute. State what he said, and not what you understand.

Mr. CLARK:

Q. Give the substance, where you cannot remember the words.

A. That anything I would have to look to at all would be to look to him; that he owned it; he reiterated that he owned it, he constantly did, and his agent constantly did——

Mr. WRIGHTSMAN: Wait a minute. We want what he said, not your conclusions.

A. And his agent's family constantly did——

Mr. WRIGHTSMAN: Wait a minute.

The COURT: Just confine your answers to the questions——

A. And on that ground——

The COURT: Wait a minute. I say I want you to confine your answers to the questions that counsel ask you, and not go beyond that, and we will get along better.

199 Mr. CLARK:

Q. Now, I want you to give me, if you have not already done so, the entire conversation had between you and those parties at your house that evening, and when you have finished that conversation, stop, and I will ask another question.

A. Well, on that claim of ownership, he asked me if he could have the hay, and I not knowing, being entirely inexperienced in business matters, and having no one to consult, Mr. Herbert was away from home, just I and my two children, I raised no protest against taking the hay, and at the same time that was all I had to look to get these taxes and interest.

Q. Now had you, prior to that time, made any arrangements for disposing of that hay?

Mr. BIDDISON: Objected to as irelevant and immaterial.

The COURT: Overruled.

Mr. BIDDISON: Exception.

Mr. CLARK:

Q. The court says you can answer the question.

A. Well, Mr. Nash, previous to that time, had called to my home, and said that he desired to buy the hay, that its lying so near Cleveland he could afford to give more for it, because it would save hauling, and he offered me a dollar an acre for the hay. That is, in the field, on the ground.

Mr. BIDDISON: We ask that that be stricken out as not responsive to the question.

Judge DALE: I don't see how it is not responsive.

Mr. WRIGHTSMAN: That is grass, Your Honor, and not hay.

The COURT: You are not a farmer, I understand.

Mr. WRIGHTSMAN: Yes, Your Honor, I have that honor.

The COURT: Farmers speak of their hay on the ground very frequently, as well as after it is cut. The question was whether she had made disposition of it.

200 A. I had the offer for it, and I replied to Mr. Nash that I thought so; that I would communicate with my husband, and let him know. And that was the way the matter rested when Mr. Wagg came.

Mr. CLARK:

Q. Now, when Mr. Wagg left you on that evening, was there anything said about seeing you further, the next day, or did you see him the next day?

A. There was nothing said, as I recall, about seeing him, but I did see him the next day, the next morning.

Q. Did he come to your house the next morning?

A. I sent my little boy for him, to ask some further information in regard to what he intended to do, or as to what his rights were, or something along that line, or what he claimed they were.

Q. And he came down in response to that request from you?

A. Yes.

Q. Who came with him at that time?

A. Mr. L. M. Drown.

Q. What conversation did you have with him and L. M. Drown that next morning?

A. Well, as far as I recall, Mr. Herbert had written me something about if he foreclosed, a redemption law, and I simply replied to that that I understood there was a redemption clause in the laws of Oklahoma, or a redemption law permitting us to redeem the land, and I asked him about it.

Q. You asked Mr. Wagg, you mean?

A. About it, yes.

Q. State what was said?

A. He said, "Anybody that tells you"—I told him, moreover, that I had not understood that that deed conveyed title; that my understanding was that it was not given, I mean, to convey title; that it was not given for that purpose, to convey title, but that my understanding had been that it was simply given to be placed in 201 trust, and until it was put on record my understanding had been that it did not convey title. There was that idea in my mind in regard to it, that as long as it was not on record it didn't convey title, but after it was put on record it did convey title. And he says, "Anybody that tells you that a deed does not convey title is no friend of yours." That is his language, I think, verbatim.

Q. Now, if there was anything further said that morning in that conversation, with Mr. Drown, you can repeat it.

A. I do not now further recall, only just some little matters aside, about the country, and the difference between Oklahoma and the eastern country; along that line. I may be able to recall later something, but at present I cannot.

Q. How many acres of that hay was there?

A. As near as I can estimate, there was about seventy acres of it. Well, possibly seventy-two or three acres. We had a small tract of land broken that we cultivated for garden and other purposes, and I don't know just how much, but not over ten acres, and possibly only eight.

Q. Now what fencing was on that land at that time?

A. Why, we had a pasture fence. That was just south of our home, and I think embraced in that pasture would be, as near as I can estimate it, about five acres.

Q. Did you have any conversation with them in reference to the hay that was in your pasture?

A. Not at that time, that I recall; but I asked Mr. Drown, later, if we could not retain the hay in the pasture, as my little boy had a cow to pasture, and he wanted it for that purpose, and he refused. That is he didn't say anything that I recall, but he sent his mowers in there, and took the hay.

Q. Did Mr. Wagg or Mr. Drown ever, at any time, account, or pretend to account, or credit you anything for that hay?

202 A. Not to my knowledge. They never said anything to me as to what they received for it, and if they ever made any credit for it, it was never to my knowledge.

Q. Did you ever regain possession, or have any use or control over that ground, after they took possession of it at the time of cutting that hay?

Mr. **Biddison**: To that we object as irrelevant and immaterial.

The COURT: Overruled.
Mr. BIDDISON: Exception.

A. I never did. They always reiterated that I lived there at their mercy; that he would not turn me out, he said patronizingly; but it was at their option, their mercy; that it was his land; that he owned it.

Mr. CLARK:

Q. Now, in reference to the correspondence that has been read to the court today. Did you, during the intervals between these letters, have any conversations with Mr. L. M. Drown, in reference to negotiations that were being carried on?
A. I did.
Q. Can you recall any conversations with him in reference to this—of his calling on you and talking to you in reference to these matters *matters* contained in the correspondence?
A. Well, he and Mr. Wagg always corresponded between my letters. He would frequently say, "I have received a letter from Mr. Wagg" and I would say, "Well, what did he say." Well, that was just simply along that line, that he owned the land, he thought, as the correspondence has given, but that I could have so long to get a purchaser, and, just as I term it, there was, to me, an entire persecution.
Q. I don't care anything about the conclusion. I want to know now whether or not you attempted to negotiate this land to other people, and if so, the result of those efforts?

203 Mr. BIDDISON: Objected to as irrelevant and immaterial.
Mr. WRIGHTSMAN: And indefinite as to time.
The COURT: Overruled. He authorized her in his letters to sell it, if she could,—half of it.
Mr. BIDDISON: Exception.

A. I came to see Mr. Eagleton in the fall of 1900, some time in the month of September, and asked him if he could get me a purchaser for forty acres of that land at fifty dollars an acre. I think I named as under the circumstances, the cloud on it, and all that—I am not sure that I named to him, but I rather think I did name to him along that line; and if he couldn't get one person to take it, if he could obtain possibly, was my suggestion to him, ten people to take four acres a piece, and they could subdivide it, or arrange it in some way that would equalize the value, and make it satisfactory among themselves. That was the proposition, I think, as near as I can recall, along that line, that I made to Mr. Eagleton.

Mr. CLARK:

Q. That was about the time of this correspondence read in evidence, that Mr. Eagleton had with Mr. Wagg?

Mr. BIDDISON: Wait. It does not appear that she knows the dates.
The COURT: She was present, and heard it all read.

A. I am sure as to the time that I made the suggestion to M Eagleton, was September, 1900. It was some time a little aft September 12, because I wrote to Mrs. Eagleton, asking her if M Eagleton would be in Cleveland at any time soon, and she wrote r that he would not, but for me to come up——

The Court: Well, you need not state any of that corresponden

Mr. Clark:

Q. Well, if there is any particular occasion that you came Pawnee, if that fixes the date in your mind, that you are able to s it was in September you were here?

204 A. I know it was in September, because, as I say——

Q. Well, I don't care anything about the reason for Now, I will ask you remember, simply to call your mind to the ma ter, of going to Muskogee to negotiate a sale?

A. Yes, sir, Mr. Eagleton——

Q. Why didn't you do that?

Mr. Biddison: Objected to as irrelevant and immaterial.

Mr. Clark: Simply calling attention to the fact of the conditi of the title.

The Court: Answer the question.

Mr. Biddison: Exception.

A. Because of the cloud on the title, was why I didn't go. I kn that people in Pawnee were located here where they could investig it, and ask for information in regard to it, and whereas there didn't know now I would go about presenting it to anyone, althou I felt perfectly confident that I could secure a purchaser——

Mr. Wrightsman: Objected to as argumentative.

The Court: Well, never mind that.

Mr. Clark:

Q. Had you any particular reason for believing you could get t money at Muskogee if you were able to go there and show you h the title to the land?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Mr. Clark:

Q. Was there any person at Muskogee that had promises you furnish you money, in case you required it to save that land?

Mr. Biddison: Objected to as irrelevant and immaterial.

Judge Bierer: To show the means of paying off the mortgage.

The Court: As I understand it, she has already stated she c not do that, because the title was not in condition.

205 Judge Dale: Perhaps you misunderstood the purport her testimony. I asked Mr. Clark to ask her the questi direct, if there was any person in Cleveland wanted to buy the la and if she knew it.

The Court: At Cleveland, or Muskogee?

Judge **Dale**: At Muskogee. And I think he better ask it, and I think that will settle it.
Mr. **Clark**: I thought I had substantially asked it, but I will try it again.

Mr. **Clark**:

Q. I will ask you whether there was any person at Muskogee who had promised——

Judge **Dale**: No, who wanted to buy the land, direct.

Mr. **Clark**:

Q. Who had offered to furnish you the money. I want to put it that way first.

Mr. **Biddison**: Objected to as irrelevant and immaterial.

Mr. **Clark**:

Q. Or had offered to buy the land.

Mr. **Biddison**: Objected to as irrelevant and immaterial.
The **Court**: She can answer that.
Mr. **Biddison**: Exception.

A. There was.

Mr. **Clark**:

Q. Who was it?

Mr. **Biddison**: Objected to as irrelevant and immaterial.
The **Court**: Overruled.
Mr. **Biddison**: Exception.

A. It was Mr. John Cobb of Muskogee, John O. Cobb.

Mr. **Clark**:

Q. You have already given the reason that you didn't go to him, but I will ask you again the reason why you didn't go to him to get the money?

Mr. **Wrightsman**: Objected to as having been asked and answered.
The **Court**: Objection sustained.

Mr. **Clark**:

Q. Now, I will ask you if you did procure the money for Mr. Wagg for the purpose of paying him off?

Mr. **Biddison**: Objected to as irrelevant and immaterial.

Mr. **Clark**:

Q. And if so, when?

Mr. **Biddison**: Objected to as irrelevant and immaterial.
The **Court**: Overruled.
Mr. **Biddison**: Exception.

A. I did. And if you will permit me to state, I never believed that Mr. Wagg——

Mr. **Biddison**: Objected to.
The **Court**: Remember what I told you. Don't volunteer anything and we will get along faster.

Mr. **Clark**:

Q. Where was that money placed, if anywhere, for the purpose of meeting that indebtedness?

Mr. **Biddison**: Objected to as irrelevant and immaterial.
The **Court**: Overruled.
Mr. **Biddison**: Exception.

A. It was placed in the First National Bank of Pawnee.

Mr. **Clark**:

Q. At what time, and how much?
A. It was placed there in the spring of 1901.
Q. How much?
A. In one instance fourteen hundred and fifty dollars, and in the other—thirteen of which was to go to Mr. Wagg, and a hundred and fifty to myself, and in the other instance I think it was a little more than thirteen hundred dollars, but I am not sure as to that; but, anyway, thirteen hundred dollars.
Q. Did you notify Mr. Wagg that the money was there?
A. I sent him a notice from the President of the First National Bank of Pawnee that it was there——

Mr. **Biddison**: Wait. To that we object, the contents of a written instrument.

Mr. **Clark**:

Q. Did you receive a notice from the President of the Bank, and if so, what did you do with the notice?

207 Mr. **Biddison**: Objected to as irrelevant and immaterial.
The **Court**: Overruled.
Mr. **Biddison**: Exception.

A. I sent it to Mr. Wagg.

Mr. **Clark**:

Q. Did you have any conversation with L. M. Drown with reference to the fact that the money was there?
A. I did.
Q. What did you tell him in reference to it?
A. I told him that I had secured the money, and that it was in the First National Bank of Pawnee.
Q. What did he say?
A. I don't recall what he said. I think he said that he would notify Mr. Wagg, or some remark of that kind.
Q. Now, I will ask you if you remember the circumstance of

having a conversation with Mr. Drown, L. M., Roy, after you had received the notice which has been exhibited in evidence, to the effect that he would not accept that, for the reason that he had sold an interest of that to Drown; did you have a conversation with Drown in reference to whether he had bought it or not, after you received that notice?

A. I did.

Q. State what occured at that time.

A. I received the letter from Mr. Wagg stating that he had sold——

Mr. Biddison: Wait. To that we object; the contents of the letter.

The Court: He asked you what your conversation was with Mr. Drown, in reference to what was in that letter.

A. Well, as I went by to school—I was teaching that spring—I stopped in Mr. Drown's store, and handed him the letter that I received from Mr. Wagg in regard to his having sold it——

208 Mr. Clark:

Q. Did he ever return that letter to you?

A. Yes, he handed it back to me at the time.

Q. Have you got the letter now?

A. Why, it was given in, in the papers. It was given over, all the letters that I received from Mr. Wagg I handed over, and also copies of my own that I had written, so as to show those to Mr. Herbert if I ever saw him.

Q. You understand that to be one of the letters that has been read here?

A. I don't recall this having been read today, but I recall having given it in, because I gave in all the letters that I received. I must have given it in. It must be among the letters.

Q. Well, was that, in substance, the same as he wrote to the bank? Well, now, after Drown read that letter, what did he say with reference to his having bought an interest in the land?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Biddison: Exception.

A. He seemed very much confused and embarrassed, and it was not true, and he didn't know why Mr. Wagg had written any such thing as that, because he had not bought an interest in it. And I think he said he had offered him an interest; I think he made that remark later. But, anyway, he said he had not bought any interest in it, and he couldn't see why Mr. Wagg had written that.

Q. I will ask you whether or not this is the letter referred to: "March 18th 1901. Mrs. W. H. Herbert, Cleveland, Oklahoma. My Dear Madam: Your letter of March 5th came duly to hand. The option extended to you expired on the 1st of March. On March
4th I sold a part to Leroy M. Drown & it is our intention
209 deed you the house & a liberal piece of land in the early
future. I think I can safely say Mr. Drown will accord you

every courtesy & the most generous treatment, in which I shall concur. Yours truly, S. R. Wagg." Is that the letter?

A. I am not sure. I would like to see it.

Judge Dale:

Q. Well, that was the purport of it, wasn't it?

A. Yes, it was that kind. He said he had sold the land, or a part of it. He said he had sold it, the way I remember the letter read. I know one letter here was read "a part," but it seems to me that he said in that one that he had sold it to L. M. Drown.

Mr. Clark:

Q. Well, now, Mrs. Herbert, do you remember any other particular conversation with Mr. Drown in reference to that during that time?

A At this time, about that same letter?

Q. No, during the time this correspondence was going on, and prior to your giving the last deed.

A. Well, I remember of telling him that I would like to pay this indebtedness, and I would like this money to be accepted that was in the bank; I remember telling him that.

Q. Well, now, what financial means did you have at that time, Mrs. Herbert, during this negotiation, say, from the time your husband left for Wichita, from that time on what was your financial condition?

Mr. Biddison: Objected to as irrelevant, and immaterial.

The Court: Objection sustained.

Judge Dale: Note an exception.

Mr. Clark:

Q. What was your financial condition at the time Mr. Drown came to your house and took possession of that hay under claim of title?

210 Mr. Biddison: Objected to as irrelevant and immaterial.

Judge Bierer: That is one of the material elements here. That is, that this deed was got by taking advantage of the party's financial distress. It was done under the claim that he was the owner, and taking advantage of her financial embarrassment.

Mr. Biddison: She says they asked her if they could have that hay, and she says she said they could.

The Court: There is one of the letters from Mr. Wagg to Drown, in which he directs Drown to take possession of the hay and apply it on the interest and taxes.

Mr. Clark: That is their answer. No, sir, there is no such letter, I don't think.

The Court: I think you read it to day.

Mr. Clark: That is the answer read by Mr. Biddison, that he did do it. But there is in this correspondence, a letter that he wrote to Mr. Drown, telling him to take charge of the Herbert farm and collect the leases, and place them in the bank to his credit.

The Court: I know, but there was a letter prior to that time, in vhich he told him to have this hay cut, and turned over to him, to emunerate him for what he had paid on the taxes and interest. She can answer this question.

Mr. Biddison: Exception.

A. What was the question?

The Court: Read the question to her.

Thereupon the stenographer read the question.

A. I was very much distressed in that way. Mr. Herbert had vritten me——

Mr. Biddison: Wait a minute. To that we object.

211 Mr. Clark:

Q. What property did you have at that time?

Mr. Biddison: Objected to as irrelevant, and immaterial.

The Court: Overruled.

Mr. Biddison: Exception.

A. I didn't have any property, under his claim of ownership of ny homestead.

Mr. Clark:

Q. Did you have any money?

A. I did not.

Q. Did you have any means?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Biddison: Exception.

A. I did not.

Mr. Clark:

Q. You had nothing whatever but this piece of land?

A. No, sir, but this hay.

Q. This piece of land, and the hay that was on the land?

A. Yes, sir.

Q. Now, I will ask you why it was that you executed this deed, this last deed, to Mr. Wagg, and accepted back from him the deed of twenty-five acres?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Biddison: Exception.

A. Because of his oppression——

Mr. Biddison: We ask that that be stricken out, as not responsive to the question, and a conclusion.

Judge Bierer: It is her reason.

A. Sir?

Mr. Clark:

Q. Tell the reasons that you accepted that offer, and made that deal with him. Why did you do it?

212 A. Because he claimed to own the land, and it was the only way that I could see by which I could retain a home for myself and children. He claimed to own it, and while he made that little statement, that he wouldn't turn me out, yet I knew from my past experience with him that there was no confidence—and my sensibilities as a lady would not permit me to live in a house that some one else owned. And he claimed to own it and under that pressure, I couldn't do anything else that I could see; because I had no one to consult with; Mr. Herbert was away; and there was no one that I could ask in regard to it. There were no attorneys to speak of, if any at all, at Cleveland at that time.

Mr. Clark: I will state, the correspondence, the letter, that the court referred to, was one written to Mr. Herbert at Wichita, after he had left.

Mr. Clark:

Q. I will ask you whether or not you would have executed that deed to Mr. Wagg, had that escrow deed not been placed on record?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

A. I would not.

Mr. Clark:

Q. Why not?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

A. Well, because my idea of the deed was that when it was placed on record, that it was a deed. That as long as it was held in trust, that of course it was a deed, but that of course it did not affect my home after that. That was my mind, that it did not affect my home until after he put in on record, and when they said that they
213 had recorded it, when I came to Pawnee, in September, 1900,
I went to the recorder's office to see for myself, if it was true. And I never had before read the deed, and I never had before read the mortgage until that time, September, 1900, because all this business had been transacted by Mr. Herbert, and I simply had just signed it, without reading it, and I held that contract in my home——

Mr. Clark:

Q. What contract do you refer to?

A. The letter contract, in which he stated he couldn't call for that deed under two years and a half, and then only in default of interest and taxes——

Q. I didn't ask you to repeat it. I just wanted to call attention to it. Now go ahead.

A. And I really can truthfully say that I didn't know until they—that I really knew, until they put forth this claim, that there was any interest due on that land, because I never had read this mortgage until September, 1900, and I just had that contract, that letter contract, in my home, and according to that contract it lacked ten months of there being any interest due at all. I called Mr Drown's attention to that contract, and he said I had referred to that contract once before, and that he had written to Mr. Wagg about it, and that is as far as he said, as far as he went in regard to it.

Q. Did you ever consent to their taking that deed from escrow, or out of the bank, and placing it on record?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

214 A. I never did; because I never knew until four or five, or possibly six months; four or five anyway, it must have been; I seen December 19, 1900, was when they placed it. I didn't know it was on record at all until that interval of time had transpired, and my first knowledge of it, it had always seemed to me, was when Mr. Wagg himself told me in the spring of 1900. But I may possibly have known it a little before that, and that letter coming addressed to Mr. Herbert and myself at Cleveland, as to whether I sent that letter to Mr. Herbert without reading it or not, as having read it since, or having heard it read in the papers, there is a little confusion in my mind as to whether I opened it and read it, or whether I sent it on; and if I did not open it and read it, I never knew myself that Mr. Wagg had this deed on record until he himself informed me so, and that was in the spring of 1900.

Mr. Clark:

Q. Now, Mrs. Herbert, during the time you have lived there on that land, and particularly since your husband had been away, and you have had to do for yours*lef*, have you been acquainted with the values of land, and the value of that particular piece of land, as to what it was fairly and reasonably worth?

A. I think so, yes sir.

Q. How did you acquire the information that you have, and had, as to what its actual value was?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

A. Well, since I have had to, I have studied business matters and noticed values, and those things. Since I have had to transact and see after those business matters myself, I have I think, acquired a great deal of information along business lines.

215 Mr. Clark:

Q. What, in your opinion, was the actual, fair, reasonable value of that land, with a perfect title, at the time you gave that last deed to Mr. Wagg?

Mr. BIDDISON: Objected to, for the reason that the competency of the witness is not shown.
The COURT: Objection sustained.

Mr. CLARK:

Q. Do you know what lands sold for in that community, as sales occurred, in a general way?
A. I think so, yes sir.
Q. Now, do you know what the fair, reasonable, market value of that land was, at the time that you made that *you made that* deed?
A. Yes sir.
Q. In May, 1901?
A. Yes sir.
Q. I will ask you what that value was.

Mr. BIDDISON: Objected to, for the reason that the competency of the witness is not shown.
The COURT: She may answer it.
Mr. BIDDISON: Exception.

Mr. CLARK:

Q. Answer the question.
A. Well, a fair, a very fair and reasonable value—Well, I might say, on consideration, the lowest value of that land, was a hundred dollars an acre, and a fair and reasonable value would be a hundred and twenty-five dollars an acre. That land is peculiarly situated.
Q. In what respects?
A. There is nothing that could ever occur to Cleveland to increase the value of properties there, any bridge, railroad, or anything, but what would immediately increase the value of that land. That land would feel it as quick as the old townsite itself, because it is 216 a part of the hundred and sixty that forms that quarter section. The old townsite is on eighty, and this is the other eighty. And the Townsite Company, I have notice—I have noticed their survey of the land, which makes me realize its value along that line. In surveying the old townsite, they had surveyed it so that the west half of Broadway blocks come right up to our line, showing that the street would have to come off of our land, and showing that they knew it would have to be taken off of our land in order to make a street at all, to accommodate the west half of the Broadway blocks. And so, for that reason, and the way it is I know it is very valuable. And I know it, again, because there is no one that ever talked to me about it but what spoke of its value; and there is no one that ever talked to me about it but what spoke of its value; and there is no one, scarcely, that ever saw it, that I know of, but what wanted it, and if they couldn't get a legal claim on it, they always tried to get an illegal claim on it.
Q. Now, the way that claim is platted, the main street, the busi-

ness street of the town, is the west block of the old townsite, is that correct?

Mr. WRIGHTSMAN: How is that, now?

Judge DALE:

Q. How does that business street of old Cleveland run?

A. North and south.

Q. How far is that from the east line——

A. Just one block; and the west half of that block is almost up to our line; it does not lack but a few feet of it, if any at all. Any way, Division street, they call it, had to come off of our land to make the street there.

Q. How far are business houses located from your land, one block?

A. Yes, sir, one block.

Mr. WRIGHTSMAN: We object to more than one counsel examining the witness.

217 Mr. CLARK:

Q. But there was no street between that one block on which the business houses were situated—there was not a street between that and your land?

A. No sir.

Q. It butted up against your land?

A. Yes, sir.

Q. Now, what was the condition of the ground of that town, as to making the most desirable part of the residence part of that town?

A. I don't know that I quite understand your question, Mr. Clark.

Q. Which way has the town built since that ground has been platted?

A. Why, it has built, you might say, all ways; but then it is evident that had there been no cloud on the title of this land, that it would have built that way, in preference to any other way.

A. Well, because the tendency was westward, and everybody whom I ever heard express an opinion in regard to it always said they would prefer to live there than anywhere else in town; and the other east half, the east addition to Cleveland, is three blocks away from the main street, I think. It is three blocks away from the main street, I think, and this is only one block. And then the tendency seemed always westward, anyway, for building purposes; and the east tract only got in by taking advantage of the cloud, you might say, on the title of the west, that prevented it from building up so fast. Otherwise, it would have been beyond any other addition in Cleveland.

Q. Now, is your husband living now?

A. He is not.

218 Q. When did he die?

A. October, 1903.

Q. How many children have you?

Mr. Biddison: Objected to as irrelevant, and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

Judge Dale:

Q. Answer the question.

Mr. Clark:

Q. How many children have you?
A. Two children.
Q. When did you first learn that you had a right to redeem this land, and that Mr. Wagg hadn't the right that he claimed that he had under the escrow deed?

Mr. Biddison: Objected to as irrelevant and immaterial.
Judge Bierer: They plead estoppel here, Your Honor, by virtue of her long delay. I don't think it comes within the statute of limitations, and we want to show there was no unreasonable delay in bringing this action.
Mr. Clark: We want to know when she first knew that she had the right that she is here attempting to assert.
Judge Bierer: And that she brought the action promptly after that.
Judge Dale: We have decisions, where it runs back twelve or fourteen years. Of course it don't affect innocent purchasers, but between these parties——
The Court: The question I have in mind is, whether or not it is not purely a matter of law, instead of a question of fact.
Mr. Clark: A matter of fact, when she had knowledge of the fact that she had been imposed upon.
The Court: She must take knowledge of the law all the time.
219 Mr. Biddison: She has not brought herself within the rule of an illiterate person.
Mr. Clark: The rule of law is that we are presumed to know the law, but equity modifies that rule.
The Court: That we are presumed not to know the law? Well, I will let her answer the question, but I am not inclined to agree with your proposition entirely.

A. It was in the summer of 1903.

Mr. Clark:

Q. How did you ascertain that fact?
A. Well, the reason leading up to it was——

Mr. Wrightsman: Objected to as not responsive to the question.
The Court: Answer the question directly. Read the question to her.
Thereupon the stenographer read the question.

A. On consultation with Mr. Clark in June; first, In May, I think it was; in the spring, anyway, of 1903.

Mr. CLARK:

Q. That is Mr. Clark who is one of the attorneys in this case?

A. Yes, sir, Mr. E. M. Clark of Pawnee.

(Referring to counsel who is now examining the witness.)

Q. After getting that information from him—Well, the dates of the papers will show how soon thereafter you commenced the action. Take the witness.

The COURT: I believe before you begin the cross-examination, we will adjourn until half past seven.

Thereupon Court adjourned until 7:30 o'clock P. M.

At 7:30 o'clock P. M., the hour to which an adjournment was taken, court convened pursuant to adjournment, all parties being present as heretofore noted, and thereupon the following proceedings were had and done, to wit:

220 Mrs. MARY B. HERBERT thereupon resumes the stand, and her examination is continued as follows, to wit:

Cross-examination by Mr. WRIGHTSMAN:

Q. How old are you?

A. I am past thirty-eight.

Q. Past thirty-eight?

A. Yes, sir.

Q. How many terms of school did you teach at Cleveland?

A. I only taught part of one term.

Q. Teach school outside of Cleveland?

A. No.

Q. Never taught school except at Cleveland?

A. Yes, sir, I taught school before my marriage.

Q. I didn't understand you.

A. I taught school before my marriage, previous to my marriage.

Q. How many years?

A. I do not recall.

Q. So many that you cannot recall, or have you any judgment?

A. I could recall by thinking about it.

Q. About seven or eight years?

A. No, not that much.

Q. Five or six years?

A. Well, I taught two or three terms of school previous to my marriage.

Q. At what place?

A. My home in Kentucky?

Q. In Kentucky. Where else did you teach school?

A. I taught one term—No, that is all that I recall.

Q. You were engaged in the millinery business, were you, in the spring of 1901?

A. I assisted my niece in the millinery business at Cleveland.

221 Q. Mr. Drown was also interested in that business with you folks?

A. He had a business transaction with my niece, yes.
Q. And you represented her in the business?
A. Represented my niece——
Q. You worked there?
A. I assisted my niece, yes.
Q. How old was your niece at that time?
A. Well, I don't know her age, but she is——
Q. Some younger than you are?
A. Yes, oh yes; several years. She is about thirty, or a little past.
Q. She was about twenty at that time?
A. I said thirty; she was thirty or past thirty.
Q. At that time?
A. Yes.
Q. How long did you engage in the millinery business, your niece, Mr. Drown and yourself?
A. Well, it was started, I think, in June.
Q. Of what year?
A. 1901. And continued through the summer and fall and winter, until it was sold in the latter part of the winter, or early in the spring of 1902.
Q. Were you engaged in business in the year 1900? Do you understand the question?
A. No, not unless it was some agency work.
Q. Well, that is what I mean.
A. That I have done, and I don't recall——
Q. What line of agency work was it?
A. I don't recall whether I was in that work in 1900 or not.
222 Q. What years were you in that work? How many years were you engaged in that agency work?
A. Yes, in the fall of 1900 I was in the agency work.
Q. What line of agency?
A. Well, in taking orders for books mostly.
Q. How much experience in that line did you have before that time? You solicited before the year 1900 for books, did you not?
A. I don't know that I did, unless I did in 1899.
Q. Well, that is what I mean.
A. I am not sure.
Q. Yes, in the fall of 1899, and the winter, and the spring of 1900 and summer, you were engaged in the book canvassing business, were you not?

Judge Dale: Objected to as incompetent, and a misstatement of the testimony of the witness.

Mr. Wrightsman:

Q. Well, state what time you were so engaged?

Judge Dale: Objected to as immaterial. I think he has gone far enough into that.

The Court: No, the cross-examination is proper. The witness testified she had no business experience whatever, of any character.

Mr. WRIGHTSMAN:

Q. You understand the question. Now answer, please.

A. Well, your question is a little confusing as to time; it is a little bit difficult for me to place the time.

Q. Yes, ma'am. Well, give yourself a good margin, and tell the court about when it was that you were so engaged?

Judge DALE: In what work?

Mr. WRIGHTSMAN: Canvassing, as a book agent.

Mr. WRIGHTSMAN:

Q. You understand the question, do you?

223 A. I don't know—— No, I can't place—I understand the question but I can't place the time. I finished a term of school in Cleveland in the spring of 1900, but as to whether I had canvassed books before that or not, I am not sure, whether it was before or afterwards. But in 1901 I assisted my niece, and after that I had canvassed. I had been in the agency work, both as to books and some other work, photo work.

Q. And you were so engaged before July 6, 1901, and don't you so know.

A. No, I am not positive as to the agency work before that time, at all. It may have been so.

Q. It may have been so?

A. But I remember, of course, of assisting my niece, as I have stated, and teaching school, and canvassing. Of course it was those ways that I made my living.

Q. Yes, ma'am.

A. Yes, sir.

Q. You say you were down here in Pawnee shortly before you had the talk with Mr. Drown and Mr. Wagg about the redemption of the deed.

A. What talk with Mr. Wagg and Mr. Drown?

Q. At your home, at Cleveland.

A. I was here at Pawnee in September, 1900.

Q. Didn't you state in your direct-examination that you had been to Pawnee, and talked to persons here, and were advised that a deed that was in escrow was no deed at all?

A. It was my attorney in 1903.

Q. No, I mean before that time. At the time you had your conversation at Cleveland with Mr. Wagg—with Mr. Drown, concerning—about the time the talk was had concerning the hay; didn't you have something to say?

224 A. No, sir, I never made any such statement, that I had ever talked with anybody, or that anybody had informed me that it was simply a mortgage, because I never knew the real nature of it at all until I had talked with Mr. Clark, in consultation, in the spring or early summer of 1903, just previous to filing this suit.

Q. Didn't you say, also, that your husband directed you to see Judge Eagleton, and you also talked with Judge Eagleton? Did you have any talk with Judge Eagleton, of or concerning this business, at any time?

Judge DALE: I beg your pardon, Mr. Wrightsman; I can't understand you.

Mr. WRIGHTSMAN:

Q. Did you have any talk with Judge Eagleton at any time of and concerning the title to this land, before you made that deed?
A. Before I made the deed?
Q. Yes.

Judge DALE: Wait a moment. I object to that as incompetent. Mr. Biddison excluded the communication between this client and Mr. Eagleton, and objected to it as incompetent, and I presume the same objection would lie here.

Mr. WRIGHTSMAN: This is concerning a fact, not as to the exact conversation, although that might be competent in this respect. But I want to show the fact that she did consult with a lawyer of and concerning it; not what the consultation was, but that she did have a conversation of and concerning her property rights. She has testified to a state of facts——

Judge DALE: I withdraw the objection. You may answer the question.

225 Mr. WRIGHTSMAN:

Q. What is the answer?
A. I don't know the question.

Thereupon the question was read by the stenographer.

Mr. WRIGHTSMAN:

Q. Answer it, please.
A. I asked Judge Eagleton——
Q. Answer that question yes or no.

Judge DALE: Wait a moment. I object to the attitude of counsel, and insist that counsel shall be respectful to the witness.

The COURT: Read the question.

Thereupon the question was read by the stenographer.

The COURT: You can answer the question yes or no.

A. Judge Eagleton——

Mr. WRIGHTSMAN:

Q. Answer the question yes or not, the court says.

Judge DALE: And then make your explanation.

A. I never had——

Mr. WRIGHTSMAN:

Q. That is not the question. Yes or no, please.
A. No.

Judge DALE: Now go ahead and make any explanation you want.

Mr. WRIGHTSMAN: Just a moment. If the court please, I think the explanation can be made afterwards.

The COURT: She has answered the question "no," and it does not require any explanation.

Judge DALE: I except to the ruling of the court on that. I think the witness ought to be allowed to answer the question fully.

The COURT: She has answered it fully. When she answered no, that she had not, it does not require any explanation, but if she had answered she had, then it would have.

Mr. CLARK: If the question——

The COURT: I don't care to take up any time on it. Proceed.

226 Mr. WRIGHTSMAN:

Q. You hadn't any talk, then with Judge Eagleton, or any attorney, in the matter of your right to this land, after, as you understood, you had become oppressed, did you.

A. There was no one ever informed me of the nature of that deed until Mr. Clark so informed me. I had talks with Judge Eagleton but it was along the line of getting me a buyer, as I stated in my previous—I have understood that he stated——

Judge DALE: Never mind that.

Mr. WRIGHTSMAN:

Q. Your talk with him was in the nature of securing his services as a real estate agent, was it?

A. As a real estate agent, because he had long before told my husband that he could not be an attorney in this case, and he had so stated to me, emphatically, that he could not be, and I never asked him for anything, as I can recollect, except just along the line of securing some one to take that forty acres of land, to enable me to pay this debt.

Q. And in these conversations—— Well, Judge Eagleton had been the attorney for your husband, had he not?

A. Well, there was some difference as to opinion——

Q. Didn't your husband tell you, and didn't you so testify, in your former examination, at the first trial of this case, that Judge Eagleton had been employed by him, and that you should have him as your counsel?

A. I think not; I have no remembrance of any such testimony.

Q. If you testified to such a fact, was it true?

Judge DALE: I object to that.

A. I do not——

The COURT: Wait a moment. You need not answer that.

Mr. WRIGHTSMAN:

Q. Well, is that fact true?

A. As to whether Judge Eagleton was an attorney

227 Q. As to your husband directing you to see Judge Eagleton?

A. Yes, my husband had written me to see Judge Eagleton at one time. He had mentioned in the letter, he said, "See Mr. Eagleton about this affair." In what way, he did not say.

Judge **Dale**: Well, never mind that.

Mr. **Wrightsman**:

Q. Well, you understood that your husband desired you to see Judge Eagleton as a lawyer, and not as a merchant or real estate agent, didn't you?

A. I did not understand it that he had written it in any such way, or any particular way, because he had said that he could not be an attorney in the case.

Q. He said that to your husband, is that it?

A. He had written it to my husband.

Q. That he could not be an attorney in your case.

A. Yes sir.

Q. And yet your husband told you to see Judge Eagleton about the case?

A. I don't know whether it was before or after. That is the letter I spoke to my attorney of, is the way I account for its being lost, as having come to the family at Cleveland, and forwarding it to him, and of course having seen it, he did not return it, and that is the way I account for it. Because I kept everything connected with this case, and turned it over to my counsel; but I remember the clause, that he said he could not be an attorney in the case, after Mr. Herbert had written to him. I know this, for it was after Mr. Herbert had written to me from Kansas he had said that, but your questions are a little confusing, and——

Q. Have you the letters from Kansas to which you now refer?

A. That Mr. Herbert wrote from Kansas?

228 Q. Yes, in which he told you to consult Judge Eagleton.

A. I don't know, I may have.

Q. I will ask you to produce it, if you have it here with you.

A. I haven't it here with me. I have some letters here with me, but whether I have that here or not, I don't know.

Q. You have several of his letters, haven't you?

A. I have several of Mr. Herbert's letters; most of them.

Q. If he so wrote you, you have it?

A. Yes sir.

Q. It is your remembrance that he so wrote you?

A. That is my remembrance, yes.

Q. I will ask you to produce it in the morning, as a part of your cross-examination. Now, with reference to the time that Mr. Drown came to your place to see you in regard to the hay; do you know where Mr. Herbert was then.

A. When he came to see in regard to the hay?

Q. Yes, ma'am.

A. I did. I was hearing from Mr. Herbert——

Q. You have answered my question. How long theretofore was it that you last heard from him?

A. How long before that.

Q. Yes, ma'am.

A. Well, I was hearing from his regularly at that time, and his habit was to write——

Q. I am not asking about his habit. I am asking you how long it was before that time you last heard from him? .

Judge **Dale**: I object to counsel's method.

A. All I can say was, I was hearing every week.

Mr. **Wrightsman**:

Q. You heard weekly from him at that time?
A. Yes, sir.

229 Q. How long before that time did this weekly correspondence exist? For what length of time?

A. All the time Mr. Herbert was away.

Q. During all the three years?

A. No. I thought your question referred to up to the time Mr. Drown came to see about the hay.

Q. Yes ma'am. You heard from him every week prior to that time, from the time of his departure from home?

A. I heard from him about every week up until the summer of 1900. Then along about July or August there came intervals of one month. He wrote me that he had been very ill. And in that way I heard from him up until November 20, 1900. The letter was postmarked November 20, but it arrived to me two or three days after. That was the last letter that I received from my husband until he returned home in the spring of 1903.

Q. What month was that in 1903?

A. In March, 1903.

Q. What was your husband's occupation during his lifetime, and residence upon your claim?

Judge **Dale**: Objected to as immaterial and irrelevant; hasn't anything to do with this case.

Mr. **Wrightsman**: As to environments, and opportunities for education, throw light upon the knowledge of this witness in business matters, etc.

The **Court**: Objection overruled.

Judge **Dale**: Note exception.

A. He was engaged in mining. He was interested in mining deals, and some timber deals at this time that you refer to.

230 Mr. **Wrightsman**:

Q. Well, he was also engaged for several years in promoting and building railroads in Oklahoma and Indian Territory?

A. He was interested in one railroad in Oklahoma and Indian Territory.

Q. Was in Washington City one winter, as a lobbyist, was he not?

Judge **Dale**: Objected to as immaterial and irrelevant.

The **Court**: Objection sustained.

Mr. **Wrightsman**:

Q. Now, you say you were offered a dollar an acre for this grass land?

A. I was.
Q. By Mr. Nash?
A. Yes, sir.
Q. You say you also had a letter from your husband that Mr. Nash wouldn't pay?

Judge DALE: No, sir.

A. I didn't make any statement of that kind.

Mr. WRIGHTSMAN:

Q. What did he say about Mr. Nash not paying; Mr. Nash was a good customer?
Judge DALE: I object as immaterial.
The COURT: Objection sustained.

Mr. WRIGHTSMAN:

Q. Did Mr. Nash tender you one dollar an acre for this land, in money?

Judge DALE: Objected to. She has not so testified.

Mr. WRIGHTSMAN:

Q. What kind of an offer was it he made you?
A. He came to my home and said he would pay me one dollar an acre.
Q. When did he say he would pay it to you?

Judge DALE: I object to that.

A. He said he would pay the cash.

231 Mr. WRIGHTSMAN:

Q. He said he would pay the cash?
A. Yes sir, as soon as I heard from my husband as to whether he would sell to him or not.
Q. You don't know what the reasonable market value of that character of grass land was at that time, do you?
A. We never——
Q. Do you know?
A. Yes, sir, I know.
Q. State what it was.
A. That was a fair value for it, lying so close to Cleveland.
Q. Whose else's grass land sold for that much at that time?

Judge DALE: We object as immaterial. All that is collateral matter.
The COURT: No, Mr. Clark asked her the question how much she had been offered for that hay, and they objected to it, and I overruled the objection and let her answer it, and the cross-examination is proper.
Judge DALE: It is proper to allow him to ask——

Mr. WRIGHTSMAN:

Q. Do you understand the question?

A. That hay was more valuable than other hay around, because Mr. Nash——

Q. I am not asking you to argue the question. Do you know of any other grass land in that community that sold for a dollar an acre?

A. No; I am not acquainted with other grass land. We had realized that much nearly every year for ours.

Q. Is there anything else you wish to add?

The Court: That is not proper.

Mr. Wrightsman:

Q. Did you receive a letter from your husband, about Mr. Nash, in reference to this hay, as to whether or not you should sell it to him?

232 Judge Dale: Objected to as immaterial, and irrelevant.

The Court: Objection sustained.

Mr. Wrightsman: Exception.

Mr. Wrightsman:

Q. Did your husband write to you and direct you not to sell it to Mr. Nash, for the reason that he would not pay?

Judge Dale: Objected to as immaterial, and irrelevant.

The Court: Objection sustained.

Mr. Wrightsman: Exception.

Mr. Wrightsman:

Q. Didn't you make the statement to Mr. Drown, upon the occasion of his visit to your home, that your husband had written to you not to sell to Nash, that he wouldn't pay?

Judge Dale: Objected to—Well, I withdraw the objection.

Mr. Wrightsman:

Q. And didn't you so state upon your direct-examination?

Judge Dale: Objected to as incompetent. I don't understand why counsel would ask that kind of a question.

The Court: Read the question.

Thereupon the question was read by the stenographer.

A. I don't recall any such statement.

Mr. Wrightsman:

Q. Now, you say Mr. Drown came to you, and asked you, or Mr. Wagg, if he could have the hay; Mr. Wagg and Mr. Drown were there together, were they not, and Mr. Wagg asked you if he could have the hay? What was that conversation in that regard?

A. On his claim of ownership——

Q. Now, I am not asking you anything about on his claim of ownership. If you will, kindly answer my questions.

A. That was what he asked me, on his claim of ownership, if he could have the hay.

233 Q. Now, did he say, "Upon my claim of ownership, can I have the hay, Mrs. Herbert"? Did he say that to you?

A. No.

Q. What did he say to you, please?

A. He claimed to own the land——

Q. I don't want what he claimed. Just use his language, if you can.

A. That is what I am trying to do.

Q. What did he say?

A. He said, "I own this land; it is mine; conveyed to me"; that is the way I recall it, and "Are you willing that I should have this hay?"

Q. He repeated all those legal conclusions, that he owned the land?

A. He did, previous to asking me.

Q. Well, did he in the same request whether or not he should have the hay, say to you that he was the owner of the land, and had title to it?

A. That same visit, in that same statement. He was there only a few minutes. Virtually the same demand.

Q. He wanted this hay to apply upon the indebtedness?

A. He did not so state.

Q. Well, you so understood it, did you not?

A. Not, sir, I did not so understand it.

Q. If it was his hay, he didn't have to ask you for it, did he?

Mr. Clark: I object to that, as a conclusion.

The Court: Objection sustained.

234 Mr. Wrightsman:

Q. What did he say he wanted to do with that hay, or the proceeds of it; what accounting did he say?

A. He never made any accounting for it.

Q. What did he say he wanted to do with the hay?

A. I don't recall that he said.

Q. For what reason did he say he wanted the hay?

A. Because he owned the land.

Q. What else?

A. That was all.

Q. What about interest?

A. He didn't say anything about interest.

Q. What about taxes?

A. He didn't say anything about it. I don't recall any word that he ever uttered about it.

Q. Do you know that he didn't say something about it?

A. I don't recall that he said anything about it.

Q. He may have made such a statement that you don't recall?

A. No, I don't believe he did.

Q. Are you positive that he did not?

A. Yes, I think that I can say that I am positive.

Q. Now you think you can say that you are positive?

A. Yes, that he did not make any such offer.

Q. Now, Mrs. Herbert, you had been conducting a correspondence for some time with Mr. Wagg, in regard to dividing this land; you are conscious of those facts, are you not?

A. I am conscious of my correspondence.

Q. Well, I am asking you about all your correspondence; I am asking you about certain facts. Do you understand the question? Please read it.

Thereupon the question was read by the stenographer.

235 Judge Dale: I object to it. I don't know what counsel means by a question of that character.

The Court: The objection is well taken.

Mr. Wrightsman:

Q. In your examination, in the former trial of this case, I will ask you if this question was not put to you, on cross-examination by Mr. Conley, "I understand you to state, Mrs. Herbert, that the only inducement given you in making that deed was the statement that Mr. Wagg made to you, was that that title—that he had a good title to that land, is that true," answer, "That was the influence that was brought to bear, yes, sir." Is that the question and answer put to you?

Judge Bierer: Objected to as irrelevant and immaterial, and improper cross-examination, because it does not tend to contradict any statement she has made in the present trial.

The Court: Objection sustained.

Mr. Biddison: Exception.

Mr. Wrightsman:

Q. Then there was no other inducement, except what has been mentioned by me, namely, the statement of Mr. Wagg that he had a good title; that induced you to sign this deed that you later executed to him; is that right?

Judge Dale: Objected to as incompetent, and not proper cross-examination. I don't think that counsel ought to be permitted to make a statement of a fact, and then ask the witness in that manner.

Mr. Wrightsman: I appreciate that I have a very——

Judge Dale: I am perfectly willing——

Mr. Wrightsman: I have a very talented witness, and I want to be just as courteous as I know how. A gentleman should always be courteous to a witness upon the stand. But a great deal is at stake here, and the witness, whether as a characteristic, or a mistake, does not answer as directly as I want. It may be that I am over-
anxious to get direct answers. I appreciate, the questions
236 might not be fully satisfactory to the learned counsel for the
plaintiff, but I want to get the facts before the court, as well as my meager mind will allow, and I ask the court's indulgence——

The Court: Well, that is sufficient. Read the question.

Thereupon the question was read by the stenographer.

A. That is right, as well as I understand your question.

Mr. **Wrightsman**:

Q. Now, Mrs. Herbert, in regard to the value of this land, I believe you testified at the time this deed was made by you, that it was worth a hundred dollars an acre?

A. Yes, sir; at least that, I said.

Q. At least that. You offered to sell it for various sums considerably less than that, did you not?

A. I did, for reasons given,—the cloud on the title.

Q. But, if you were to sell it for that, it would leave the cloud off, wouldn't it, and didn't you so know?

A. No; I was very inexperienced in practical business matters, along all these lines, real estate, and in fact I didn't know as much as one of my children.

Q. I am not asking you anything about your experience, the fact that you——

A. You asked me if I knew, Mr. Wrightsman, and that is my answer. I did not know. You asked me if I knew.

Q. Well, did you- experience in the business of the world at that time force you to believe that if the land was worth a hundred dollars an acre, that you should offer it for a considerably less sum? Was your inexperience of such a degree and character as to prevent you from offering your land for sale for its reasonable value at that time?

A. Why, as I understand it, at that time it was not my land, it was Mr. Wagg's land. He so stated.

237 Q. Yes, but you had a claim, didn't you, to twenty-five acres of it, afterwards. You had an equity, and you claimed it, in this land, and after the transaction was finally had between you and Mr. Wagg he gave you twenty-five acres, didn't he?

A. A passing claim, but there was still a cloud——

Q. And before that transaction was made, you had corresponded with Mr. Wagg concerning a division of this land, and concerning your claim to an equity in it, didn't you? You don't mean to tell the court you didn't have any interest in the land at that time?

A. I had a very great interest in it. I was seeking to secure my home.

Q. Now, in seeking that interest, wasn't it your desire to secure for that land its reasonable market value at that time?

A. My main desire at that time was to secure a home for myself and children.

Q. Yes, ma'am, I hope so; and please answer my question.

A. Your questions, Mr. Wrightsman, are very confusing.

Q. Yes, ma'am, but they are very simple to me.

A. They are very confusing to me.

Q. Please read it to the witness.

Judge **Dale**: Which one do you want now? You have asked five questions.

Mr **Wrightsman**: The last one.

Mr. Wrightsman:

Q. I believe you answered that you had a considerable interest in it?

A. In seeking to secure my home, yes.

Q. And I asked you if it was not your desire to secure for that land a reasonable market value, and I believe you answered that your interest was to get a home for your family and your children. 238 Now, if you had an interest in that land at that time, or an equity, and that land was worth a hundred dollars an acre, why is it that you offered to sell that land to one party for thirteen hundred dollars, and to another party for fourteen hundred and fifty dollars?

Judge Dale: Objected to as assuming a fact not in evidence.

Mr. Wrightsman: She testified to that on direct examination.

Judge Dale: Oh, no.

A. Why, I——

Judge Dale: Wait a minute.

The Court: I don't remember the fourteen hundred and fifty dollars. She testified that she offered forty acres of the land.

Mr. Biddison: If the court please, if the court will recollect, she testified that fourteen hundred and fifty dollars were deposited here, out of which she was to get one hundred and fifty dollars.

The Court: That was to pay Mr. Wagg.

Mr. Biddison: She was to sell forty-five acres of the land for that.

The Court: No, she didn't say she sold the land for that.

Mr. Wrightsman:

Q. Did you testify on direct-examination that fourteen hundred and fifty dollars was placed in the First National Bank of Pawnee, for and on your behalf, to lift the title to this land?

A. I did.

The Court: But she didn't say she sold the land for that.

Mr. Wrightsman:

Q. You were willing to take the fourteen hundred and fifty dollars at that time for this land, were you?

239 Judge Bierer: What land?

Judge Dale: The eighty acres?

Mr. Wrightsman:

Q. How many acres were involved for the fourteen hundred and fifty dollars?

A. Fifty acres.

Q. Fifty-five acres, wasn't it?

A. No, sir, there was fifty acres involved in that transaction, only.

Q. Who did you have this negotiation with?

A. It was W. B. or W. D. Deem.

Q. The gentlemen that was on the stand here?

A. Yes, sir.

Q. Did he give you a letter to send to Mr. Wagg of and concerning the purchase of that land?

A. I don't recall any letter that he gave. The First National Bank gave me——

Q. I am not asking you about the First National Bank. You say you have no recollection about Mr. Deem giving you a letter to forward to Mr. Wagg?

A. Unless it was this letter from the First National Bank. He gave me a paper to forward to Mr. Wagg, which I did, stating that the money was there.

Q. Did anyone in Mr. Deem's behalf give you a letter to forward to Mr. Wagg, outside of the letter from the First National Bank, of which you speak, concerning this transaction?

A. No one that I recall, no.

Q. Didn't Mr. Deem give you a letter to send to Mr. Wagg concerning an offer upon this land, and thereupon placed in the First National Bank fourteen hundred and fifty dollars, and did you not fail to send that letter to Mr. Wagg, but allowed that money to remain in the First National Bank for thirty days, without any action being taken on your part necessary to facilitate this trade.

240 A. None of the statements that you have made are correct. I sent the notice from the Bank to Mr. Wagg, that the money was there. This notice was signed, if I recollect the matter right, and I think I do, it was signed by C. J. Shapard, of the First National Bank. We have asked for copies of those, or for this notice to be produced. I sent two Mr. Wagg, one from Mr. Sloan, and one from Mr. Deem, I mean the bank, in regard to the money for these parties.

Q. Didn't you enter into a written contract with Mr. Sloan to sell him fifty-five acres for fourteen hundred and fifty dollars?

A. I did not.

Q. Did you enter into any contract with him?

A. No written contract.

Q. What was that verbal contract? To sell him fifty-five acres for fourteen hundred and fifty dollars?

A. With Mr. Deem or Mr. Sloan?

Q. Mr. Sloan.

A. Mr. Sloan came to my home——

Q. I am not asking whether he came to your home or not. Did you have such a verbal agreement with him?

A. I am trying to tell you about the contract.

Q. Answer my question, and we can make it short. Did you make an agreement with hi*n*, a verbal agreement, to sell him fifty-five acres of this land for fourteen hundred and fifty dollars yes or no.

A. I can't answer that question, Mr. Wrightsman, in that way.

Q. You can't answer it?

A. I cannot answer it in that way, because it does not state the transaction as it occurred.

Q. Well, I will ask you to state the transaction as it occurred.

A. The transaction as it occurred is, that Mr. Sloan asked me—agreed with me to put this money in the First National Bank
241 of Pawnee, in the Bank of Pawnee, and that he would send me a notice from that bank to send to Mr. Wagg, that this

money was there as soon as he sent this release of the mortgage on, that the money was there for him; and that was what the notice said that I received from the President, and which I forwarded to Mr, Wagg. And, as I understand that, that there was no agreement; the agreement only was, that if this release was sent on, and if anything between Mr. Sloan and I could be made satisfactory as to the title when this release came on, this money was to be turned over and forwarded to Mr. Wagg, and Mr. Shapard so wrote him——

Q. I am not asking you what Mr. Shapard wrote him. How much were you to have out of this?

A. I can't remember the amount Mr. Sloan put in the bank. I know it was thirteen hundred dollars, but it seems to me it was over that so that this thirteen hundred dollars was to go to Mr. Wagg and the other was to come to me.

Q. You don't know of your own personal knowledge why these sales were not consummated, except as to what you have related, do you?

A. Yes, I know why they were not consummated.

Q. Then tell the court why.

A. Why, because I received a letter at Cleveland from Mr. Sloan and have the letter here with me in court, stating that he had received a letter from Mr. Wagg, after that money had remained there in the bank about a month, or almost a month, just two or three days of a month, before Mr. Wagg replied, but he wrote both to the bank and to Mr. Sloan, and I have those letters, saying that my time had elapsed in which I had to redeem this land, and that if he wanted it, he had made a sale, or a partial sale to L. M. Drown, and that if he wanted this land he would have to see them, and it required more than thirteen hundred dollars, and he told Mr. Shapard so, to buy it.

242 Q. When was that?

A. That was in the spring of 1901.

Q. What month?

A. Well, it was between the twenty-fifth day of March—No. These letters, you mean, that Mr. Wagg wrote?

Q. I refer to the information that you got from Mr. Sloan.

A. Mr. Sloan first told me that he would buy the land in February——

Q. No, I don't mean that. I mean the inability to consummate the trade.

A. That occurred between the twenty-fifth of March and the last of April, was when I got the letter from Mr. Wagg declining this money.

Q. At that time, do you know how much was due, interest, taxes, and principal, according to the terms of that mortgage contract?

A. I don't know, but I know only just what he said he would take and that was thirteen hundred dollars.

Q. When did he say he would take thirteen hundred dollars?

A. Why, he said it first when those letters—the dates when those letters so state, but he never denied——

Q. What time was that?

A. Well, that was in 1900, but he extended that time in those letters.

Q. Now, that's it. Now, the agreement to take thirteen hundred dollars was limited to October, 1900, was it not?

A. No, the time was extended, and he never added any more to it; he never said there was any more due him.

Q. Answer the question. Didn't he tell you that he would take thirteen hundred dollars in October of 1900, as the amount of legal debt, including principal, and interest and taxes, upon this mortgaged property?

A. October or November, no, sir, his letter read; and then he wrote me another one, he would extend the time to January.

243 Q. Just a moment. Now, those letters were so written to you in the year 1900?

A. Yes.

Q. Referring to an extension of that mortgage indebtedness to October of that same year, that is right isn't it?

A. October or November, he said.

Q. Yes, ma'am, of 1900; for thirteen hundred dollars?

A. Yes.

Q. And this transaction to which you now refer, of Mr. Wagg, so you were informed, refusing to accept thirteen hundred dollars, transpired the latter part of March of the succeeding year?

A. Yes, but he never had refused—never had added any more to it.

Q. There was a hundred dollars additional interest accrued at that time, isn't that so?

A. He had charged me over-interest in this thirteen hundred dollars; he had charged me beyond, so my attorneys have estimated.

Q. Yes, ma'am. I am not asking you what your attorneys have estimated; but there was accrued interest of nearly a hundred dollars additional to the time he said he would settle for thirteen hundred dollars?

A. No, I don't know that.

Q. You know there was considerable interest accrued?

A. I think the thirteen hundred more than covered it all.

Q. Do you know.

A. I feel about positive it did. We can soon estimate it.

Q. Have you ever figured that thing up to ascertain?

A. I never have.

Q. You don't know, then, whether it was or was not?

A. My attorney, Mr. Clark, has, and I have his word for it.

Q. Then the offer that was made to you by Mr. Wagg, to settle for thirteen hundred dollars was six months before this money was deposited in the First National Bank of Pawnee?

244 A. Well, October or November, counting from November, about when I first informed Mr. Drown of having a buyer, that was the middle of February, 1901, I don't think you could hardly call it six months. There would be——

Q. Well, say four months, or five months.

A. There would be November, December, January,—be about three months and a half.

Q. Well, if you commenced with the first of November, it would be five months, running up into March, wouldn't it?

A. Oh, if you count the time that he declined it, and let it lay in the bank a whole month before he answered, it might be four months and a half.

Q. Well, there would be, as you understood it at that time, some papers to be signed by Mr. Wagg, before a trade could be consummated; there would have to be a release, you say, and also something coming to you. You understood you were to have something out of this fourteen hundred and fifty dollars on the fifty acres, didn't you?

A. That was the offer that was made, yes.

Q. That was coming to you for what? For an interest you had in the land, or were you getting that money on false pretenses?

Judge DALE: We object to that question.

The COURT: The objection is well taken. That is not a proper question.

Mr. WRIGHTSMAN:

Q. Were you getting that hundred and fifty dollars for a pretended claim of interest by you to that forty-five acres of land?

Judge DALE: We object to that. I don't know what counsel means.

Mr. WRIGHTSMAN: I think the court will agree with me that the question is highly proper, if I state it with reference to the 245 previous matter. She testifies she caused fourteen hundred and fifty dollars to be placed in the First National Bank for the purchase of fifty acres of this land, thirteen hundred of which was intended for Mr. Wagg, and one hundred and fifty for herself. Now, if she had no interest in that land, as she believed, for the reason that Mr. Wagg had exclusive title to the same, and exclusive right to the same, and exclusive ownership to the same, then by what right did she assert her claim to the one hundred and fifty dollars? It goes as an admission against interest.

The COURT: It may have been because Wagg had written her two or three times to get a purchaser for it, and he would take thirteen hundred dollars.

Mr. WRIGHTSMAN: I want to find out what the witness's theory was in that regard, of her assertion of right to that one hundred and fifty dollars.

Judge DALE: She had a complete right to it——

Mr. WRIGHTSMAN: I don't want the counsel to tell the witness.

The COURT: Read the question.

Thereupon the question was read by the stenographer.

The COURT: Objection sustained.

Mr. WRIGHTSMAN: Exception.

Mr. WRIGHTSMAN:

Q. At the time this money was deposited in the First National

Bank, you claimed and asserted an interest in and to this fifty acre of land, did you not?

A. I claim an injustice——

Q. No, I am not asking you about an injustice. Answer tha question yes or not.

Judge Dale: Read the question.

Thereupon the question was read by the stenographer.

Mr. Wrightsman:

Q. Do you understand the question?

A. I certainly felt that I had an interest in it; we had hom steaded it; yes.

246 Q. You advertised this land for sale in the "Clevelan Triangle," a newspaper published in your town, did you not

A. I think so, under Mr. Wagg's permission.

Q. Under Mr. Wagg's permission.

A. Yes, permission to sell; the letters he had written me, givin me permission to sell the land.

Q. I will ask you if you did not advertise for sale in the Clev land Triangle forty acres of this land, and which advertisement a peared from September 20, 1901, to January 13, 1901?

Judge Bierer: Objected to as not the best evidence.

The Court: Objection sustained.

Mr. Wrightsman:

Q. Did you cause that advertisement to be made?

Judge Dale: We object to that, as incompetent, and not the be evidence.

Mr. Wrightsman: I asked her if she caused the advertisemen to be made. It might be in the newspaper without her authority.

Judge Bierer: Let's see it first.

The Court: Objection sustained.

Mr. Wrightsman: Exception.

Mr. Wrightsman:

Q. As a matter of fact, there wasn't any market for this land, any sale, beyond the two offers that were made, which you have te tified in regard to, during the year 1900, is that right?

A. No, it is not right.

Q. Now, Mrs. Herbert, with reference to these two offers that we made to you, thirteen hundred and fourteen hundred and fifty, r spectively, by Mr. Sloan and by Mr. Deem, isn't it a fact that the offers were made upon condition that you got Mr. Herbert's sign ture to this conveyance?

247 Judge Dale: Objected to as incompetent, immaterial an irrelevant.

The Court: She can answer.

A. No, sir, they were not. These gentlemen never spoke to n about his signature.

Mr. WRIGHTSMAN:

Q. Well, now, you have answered my question. That is all I asked. Now, Mrs. Herbert, speaking about the location of your land, isn't it a fact that the north and eastern portion or parts, of the townsite of Cleveland, is now, and always has been the most valuable and high-priced residence property in and about Cleveland.

A. The north and eastern portion?

Q. Yes, Ma'am.

A. Of this tract of land?

Q. No, ma'am, of the original townsite.

A. The north and eastern—no, sir, no, indeed.

Q. And isn't it a fact that the Herbert Addition, during the yeai concerning which you have testified, was only inhabited by the poorer class of town people?

Judge DALE: What year is that?

Mr. WRIGHTSMAN:

Q. 1900 and 1901.

Judge DALE: There wasn't any Wagg townsite at that time.

Mr. WRIGHTSMAN: 1902.

Judge DALE: Until they platted it.

Mr. WRIGHTSMAN: It was platted long before. I will bring that out. I am glad you suggested that.

Mr. WRIGHTMAN:

Q. Answer my question, first, please.

A. No, sir, I wouldn't so consider it.

Q. Which portion of this townsite addition known as the Herbert homestead is equally advantageously located or situated, with reference to its value as a townsite?

248 A. You mean all parts of it are equal as to value?

Q. Yes, ma'am.

A. That could hardly be possible with any lo-ation.

Q. That is what I want to know. It is not rocky?

A. Oh, no. I don't know that I understand your question. No, it is a most beautiful tract of land, beautifully located.

Q. The west slope is uniform, and the east side is uniform in its value, isn't it, about?

A. Well, I have always considered that that lying nearer Cleveland would necessarily be more valuable than that lying further away, as a business proposition.

Q. And the north anl south side is about equally valuable?

A. About so, outside of the oil interests as a residence.

Q. Before you got oil, I mean.

A. Well, I think so.

Q. Now, Mrs. Herbert, when you sold to Mr. Sloan in the year 1902, sixteen acres of this land joining the townsite of Cleveland for fifty dollars an acre, how did you account for that proposition when you say that land was worth a hundred dollars an acre the year before?

A. Why, I account for it on that oppression.

Q. There was no oppression——

A. Oh, this deed. You say when I offered to sell to Mr. Sloan? There was certainly an oppression. They claimed the ownership of the land.

Q. Now, Mrs. Herbert, don't you know the sixteen acres you sold was not a part of the fifty-five acres concerning which you and Mr. Wagg had contentions?

249 A. Oh, I misunderstood you. You are referring to the fifteen acres on the south, are you? I misunderstood your questions.

Mr. Clark: You mis-spoke the name.

A. You said Sloan.

Mr. Wrightsman:

Q. I meant Swan.

A. That was where I made my mistake.

Q. Yes, ma'am. The land that Mr. Swan purchased of you consisted of how many acres?

A. Well, about fifteen, I think.

Q. Fifteen acres?

A. I think so, estimated.

Q. And that was to the south and east part of your land, joining the townsite?

A. Yes.

*A*. And you sold that to him in 1902?

A. I did. I sold just my signature to him.

Q. Just your signature?

A. Yes, sir; there was a cloud upon that title.

Q. What cloud did you have upon that title at that time?

A. Simply because I had not been able, up to that time, and for some time afterwards, to hear from my husband, and when they brought the deed forward they brought it for his signature, and I couldn't obtain it, and then they erased it, with full knowledge that he was still alive; but I was unable to hear from him, and they bought my interest in that land, was all they bought. They consulted an attorney——

Q. I don't care anything about your consulting an attorney. Answer the question.

Mr. Clark: I submit——

The Court: The answer is directly in line with your question.

250 A. When they brought me the deed, they had the word "single" after my name, and I had asked Mr. Means, who was the negotiator between them, I says, "If you will bring me what you want of me along before the time of signing it, and if it is satisfactory, and something that I can sign, we can go through with this, and if not, I can't tell you." And so he brought it to me, and I says, "It is a delicate question, Mr. Means, with me, but I will have to tell you I can't sign this deed with this word after my name, because I don't know that that is true at all," and he sat down to my table, and erased it, and that original document shows the

sure. And he says, "It does not make any difference, Mrs. Her- t, we want your interest, but we consulted an attorney last even- , and he said if we got that word after your name, it would make ll right." And I says, "I will go to Pawnee, and you can just e this back to Mr. Swan and tell him this cannot go through," l he there erased it, and accepted it with full knowledge and when ent up to the bank, and before I signed it, I asked him if he had l Mr. Swan what I had told him, and he says, "I did."

Mr. Wrightsman:

Q. Now you conveyed to Mr. Wagg no greater, and no less title n you conveyed to Mr. Swan?

Judge Bierer: Objected to as argumentative.
The Court: The objection is well taken.

Mr. Wrightsman:

Q. When you said this land was worth one hundred dollars an e, upon your direct-examination, did you mean upon the basis such a conveyance as you could make to the same?

A. I mean—never, at any time, had I ever valued that land at than one hundred dollars an acre.

Q. That is not the question.

A. I mean that upon the ground that that—that there was no ud on that title, that I could have, at any time, turned that land Muskogee for not less than one hundred dollars an acre, and I believe more.

Q. That is not the question yet. When you said that that land was worth one hundred dollars an acre at the time of conveyance to Mr. Wagg, did you mean to be understood as eing that value on it with reference to the title you could give to same, or was it worth a less amount?

A. I think that it was worth that, even with the title that I could e to the same, but my purchasers were a little uncertain about the e in this business that I refer to, about Mr. Herbert's signature.

Q. Then, if that was worth one hundred dollars an acre then— ll. At that time there was no railroad, I believe you stated, grade track to Cleveland, that you knew of?

A. There was a great deal of railroad talk.

Q. Yes, ma'am, we have always had that?

A. Yes.

Q. Did you know of any railroad survey being definitely located hat time?

A. No, I don't think that they had made that survey.

Q. When you sold this addition to Mr. Swan in 1902, the Katy ilroad was building into the town of Cleveland, was it not?

A. No sir.

Q. The definite survey and location was then had, was it not?

A. No, sir, when I sold to Mr. Swan, Mr. Wrightsman, property l depreciated just along that line, in value, for the reason that report had come to Cleveland that Blackburn had the road, and your Mr. Drown there himself told me he had just bought a piece of property that he would be glad to sell for what he had given for it. He says, "We are not going to get the road."

Q. Mr. Swan was the right of way agent for the Katy railroad, wasn't he?

A. Yes.

252 Q. And you knew it at that time, too, didn't you?

A. No, I didn't know it at that time. I knew it afterwards; and that they were into a scheme, I heard, to get this railroad to circulate this report, to get real estate into their possession.

Q. And there had been a real estate boom in that town before that time?

A. Just a little bit.

Q. That boom inflated values in the town?

A. Well, I think a little it may be.

Q. Yes, ma'am, and the year before there was no talk of a railroad. How far is Blackburn located from Cleveland?

A. Well, I don't know. I have understood about twelve or fifteen miles.

Q. About fifteen miles?

A. Enough to have ruined Cleveland, had they got the road instead of Cleveland.

Q. Yes, ma'am, but I am not asking you for that argument. Just answer the question, please. And you say that on account of the railroad prospects, this land depreciated, then, in value from a hundred dollars to fifty?

A. No, I didn't make the statement that way, Mr. Wrightsman.

Q. Well, I beg your pardon.

A. I said for reasons as given I was compelled to sell, that is, my signature to the land.

Q. Yes, ma'am, your signature to the land.

A. Yes, sir, I was compelled to sell my interest, my signature.

Q. That took your acknowledgement with it?

A. Yes sir.

Q. And when you sold to Mr. Wagg you gave your affidavit, also to the land?

Judge Dale: I object to that as incompetent.

253 The Court: Objection sustained.

A. I don't know, quite, what you mean.

The Court: There is no use repeating what is already in evidence.

Mr. Wrightsman:

Q. At the time you sold to Mr. Swan, you had not heard from your husband for years? He was absent and away from the Territory?

A. I have not heard since the time so stated.

Q. Mrs. Herbert, your husband platted this Herbert townsite, in conjunction with some Muskogee parties, did he not?

. I do not know as to that, at all.
. How is that?
. I do not know as to that.
. Well, don't you have any knowledge of any statement made
ou by Mr. Herbert? You knew that Mr. Herbert was negotiat-
with some Muskogee parties, didn't you?
. No, I didn't know of that business transaction at all, any fur-
than that there was some Muskogee people and Mr. Herbert
interested in business matters; but as to platting it, or things
hat kind, that you speak of, I had no personal knowledge of it.
. You had no personal knowledge, but you were, nevertheless,
rmed by your husband that he had platted a townsite addition
our home?
. As I understood it, it was just simply drawn off, looking to
future prospects of the town; just simply drawn off; never was
rded, or anything of that kind, but just simply themselves had
ined a plat.
. And that was in what year?
. I don't know anything as to that, Mr. Wrightsman, at all.
asked me if I had heard, and I just simply recalled what I had
heard.

Q. To refresh your recollection, did that not happen in the
year 1895?

. I don't know, I couldn't say.
Your husband proved up title to this land under the ten dollar
did he not?
. He proved up according to the laws, and we got our patent; I
't know as to what act it was under.
. Well, you understood he paid ten dollars an acre to the gov-
ment for it, didn't you, for townsite purposes?
. No, sir, he didn't pay any money to the government for town-
purposes. We proved up on that land, he had it as a home-
d, and he paid only two dollars and a quarter an acre for it.
. How long did he live on this land before he proved it up?
. Why he lived there all the time, he did, except when he came
Iuskogee for us.
. That is not the question. When did he make his proof in
land office?
. Why, he took advantage of the fourteen months law, and
ved up on it.
. Mrs. Herbert, I believe you stated that it was six months after
had executed that first deed with your husband before you
w of the facts of the transaction, is that it?
. You will have to state what you mean.

Ir. WRIGHTSMAN: Read the question to the witness.
hereupon the question was read by the stenographer.

. No sir, I did not so state.

Mr. WRIGHTSMAN:

Q. When did you first know that you had signed a deed to Mr. Wagg in conjunction with your husband?

Judge BIERER: Object to that, as the wrong construction of her testimony.

255 Mr. WRIGHTSMAN:

Q. When did you first understand that you had signed a conveyance to Mr. Wagg?
A. Do I understand that I must answer the question.
Judge DALE: Yes, go ahead.
A. I don't know to this day that I ever signed this deed; I have no remembrance of ever signing it.

Mr. WRIGHTSMAN:

Q. Before a notary public.
A. Do you mean this escrow, this trust deed, placed in the Bank of Cleveland?
Q. Yes.
A. Well, I don't know to this day that I signed it.
Q. You know your signature?
A. Well, I don't think that I have ever seen the original. We asked for it last year.

Mr. CLARK: You have got it, Mr. Wrightsman, and I make a demand for it right now.
Mr. WRIGHTSMAN: I haven't it in my possession. If the other counsel have it, you can have it in the morning, if it is here.

Mr. WRIGHTSMAN:

Q. You knew of the fact, of course, at the time you executed this last deed to Mr. Wagg, that you were executing a deed of conveyance to him, did you not?
A. I know that I regarded.——
Q. Answer that question.
A. That I signed this deed——
Q. What is that?
A. In order to get my home clear. I know that he required that I sign this deed in order to get my home clear.
Q. He gave you your house. What was the value, by the way, of your house, what did the house cost you?
A. I don't know; Mr. Herbert paid for it.
256 Q. Haven't you some judgment? The only improvement you had on that property was the house, was it not, to speak of?
A. Well, except fruit trees; it was the only house on the land.
Q. Well, that was included in that reserve that he gave you. Now what was the value of this house at that time?
A. I don't know. I have since that time—I can tell something of its value now. I didn't know its value then, but I have since that time——

Q. Well, we are not asking you anything about that, Mrs. Herbert; kindly answer the question. Do you know whether it was worth five or six hundred dollars at that time?

A. No, it was not worth that much.

Q. About how much do you suppose?

A. Oh, I don't know.

Q. How many rooms did it have?

A. Three rooms.

Q. What was the size of the house?

A. I don't know its size; they are large rooms.

Q. About twenty-eight feet square?

Judge DALE: You mean the house or the rooms?

Mr. WRIGHTSMAN:

Q. The house.

A. No, it is not square at all.

Q. It was at that time, wasn't it?

A. No it wasn't ever square.

Q. It was plastered?

A. No, it was not plastered.

Q. Ceiled?

A. It was not ceiled at that time.

Q. Well, how much was it worth at that time, or have you any idea?

257 Judge DALE: She has already stated she didn't know.

Mr. WRIGHTSMAN. She is not impoverished; she knows.

The COURT: Answer the question.

A. It was not worth very much. I don't know, hardly, how much to say it was.

Mr. WRIGHTSMAN:

Q. It was a hip, shingle roof, was it not?

A. Yes, it was a shingle roof. At that time it was looking badly. It was not ceiled; it was not weatherboarded; you can probably estimate the value better.

Q. You say it was not weatherboarded?

A. No, not at that time.

Q. What did it have on the outside?

A. It was simply boarded up and down, and stripped, that is all. And it was not ceiled; just simply had the heavy paper; is all.

Q. At the time you made this last deed to Mr. Wagg——

A. At the time he took my hay, my house was leaking badly.

Q. Now, we are not asking you about that.

A. I would like to state it, however. It is one matter of oppression.

Q. Was the house in the condition that you have described it, in May, 1901?

A. I have just described it correctly.

Q. Have you any idea of its value?

A. Well, from my description, I believe you could estimate the value better than I. I have told you the description. It was not weatherboarded; it was not ceiled.

Q. Did it have a floor in it?

A. Yes, but the roof was in very bad condition; it was leaking badly.

Q. Worth three or four hundred dollars?

A. I should not like to say that it was worth that much.

258 Q. Worth a hundred dollars?

A. Oh, it would be worth that; decidedly, it would be worth that.

Q. About one hundred and fifty dollars, would you think, would be a fair, reasonable value? Now, if Mr. Wagg had told you to have so done, would you or not have executed him a deed to the entire eighty acres of land, instead of to fifty-five acres?

Judge Dale: I object to the question. The testimony is——

Mr. Wrightsman: Well, the court knows what the testimony is.

Judge Bierer: We object to it, as not proper cross-examination.

The Court: Objection sustained.

Mr. Wrightsman:

Q. Did anything prevent you from executing a deed of conveyance for a greater amount of land than fifty-five acres?

Judge Bierer: Objected to as not proper cross-examination; there is no hypothesis of that kind in this case.

The Court: Objection sustained.

Q. Did Mr. Wagg freely and cheerfully release all claim to the twenty-five acres of land that you retained?

Judge Dale: Objected to as incompetent, and not proper cross-examination.

The Court: Objection sustained.

Mr. Wrightsman:

Q. Did Mr. Wagg assert any claim or control over this twenty-five acres?

Judge Bierer: When?

Mr. Wrightsman:

Q. At the time you executed this deed to him for the fifty-five acres. Answer that question yes or no.

A. He fixed the deeds in a way so that I didn't know really that I had the twenty-five acres clear after it was fixed.

Q. After all that correspondence?

A. Yes sir.

259 Q. You didn't know then, after you had made this deed to fifty-five acres, that you had reserved twenty-five?

A. I did not know, no, sir. I still thought he had a claim on it. I spoke to Mr. Clark of his conflicting dates he made there. And I spoke to Mr. Drown about it. And it was under that oppression that he secured that statement, what he calls an affidavit. It was under that very oppression, because he came to me, and says, "Mrs. Herbert, you know that you said you did not know the twenty-five acres were clear, and this affidavit will make it clear, because it so states here. And it was one of the oppressions that he used.

Q. Now, Mrs. Herbert, didn't he ask for that affidavit for the purpose of showing that your husband had not been heard from for a considerable time past, and for that purpose only?

A. No, sir. That may have been his purpose——

Q. How is that?

A. He asked for it because Mr. Herbert had not been heard of, but I am speaking of these things in my mind as the oppression under which he secured it.

Q. Isn't it a fact that at that time you thought your husband had gone, never to return?

A. I thought just as I stated, truthfully, that I believed he was dead; that I believed that he was; that is what I said.

Q. And was not that affidavit requested of you by Mr. Drown for the purpose of clearing an apparent cloud upon the title, with reference to your husband's existence?

A. Mr. Drown gave me extracts of those letters that were read to day, and it was that oppression that secured that affidavit.

Q. I am not talking about that re-iteration of oppression. Didn't Mr. Drown, for those reasons, state to you he wanted that deed signed?

260 Mr. Clark: I object, because it is impossible for her to tell the motives of Mr. Drown and Mr. Wagg.

Mr. Wrightsman: I am not asking for Mr. Drown's motives; I asked if Mr. Drown did not state that to her.

The Court: Read the original question. I don't think it states that.

Mr. Wrightsman: I will withdraw that question.

Mr. Wrightsman:

Q. Didn't Mr. Drown state to you that he wanted you to sign that affidavit, for the reason that it was necessary to clear up the cloud on the title to this land, in that you had not heard from your husband in a long time, and it was his supposition and yours that your husband was dead, or words in substance to that effect?

A. No, sir. He stated to me he didn't care anything about it at all. That he simply wanted it to satisfy Mr. Wagg. That Mr. Wagg was putting this oppression on him, and threatening to withdraw all interests from him and his brother if he didn't secure this affidavit from me. That is what he stated to me.

Q. Mr. Drown used the word "oppression," too, did he?

A. Mr. Drown said Mr. Wagg was——

Q. Is that your language?

A. I certainly have to tell things in my own language, Mr. Wrightsman.

Q. Well, you have got this word "oppression" mixed up with Mr. Drown's language. Did he use the word "oppression"?

A. He said Mr. Wagg was making it very unpleasant for him.

It was some language he used that conveys the same idea; that Mr. Wagg was putting a pressure on him.

Q. Well, there was no oppression——

Judge DALE: Pressure, she says.

Mr. WRIGHTSMAN:

Q. There was no duress, pressure, or oppression upon either you or Mr. Drown, when you wrote the letter that accompanied
261 the deed, to the effect that your husband was missing?

A. Yes, sir, because he refused to give me the home, unless I made an affidavit, and Mr. Drown presented me one, a statement, and Mr. Drown presented me one that I refused to sign, and Mr. Clark has that in my papers. And I says to him, "I will write a letter to Mr. Wagg, instead of your statement you have made out. I can't possibly sign it." And so I wrote that letter. And it was under that oppression. I refused still—And he told me positively not to make the transfer to me unless I made the statement. That first was certainly under the oppression, and the other was under the oppression. And the conflicting dates, I have drawn Mr. Clark's attention to.

Q. I don't care what you have drawn Mr. Clark's attention to. He is a very talented lawyer, I appreciate that. But get down to the facts.

A. I am trying to answer your questions to the best of my ability, but sometimes you put them in a way that I cannot conscientiously just follow you.

Q. I don't want you to answer anything that will impose upon your conscience, or my own.

Judge DALE: You can't hurt Wrightsman's conscience.

Mr. WRIGHTSMAN:

Q. Now, Mrs. Herbert, as I understand, there was no reason in your mind why you should refuse or decline, of your own volition, to sign this statement, that you were a supposed widow, or that your husband had departed from the Territory and not been heard from for several years past, and you thought he was dead,—there was no reason in your own mind at that time why you should not make such a statement?

A. None at all, except that it was a very sore and delicate point to me, and I hated—I disliked very much to make any statement in regard to my domestic affairs.

262 Q. Upon that proposition——

A. I believed—just let me state, Mr. Wrightsman,—I believed it was some great trouble. I knew positively in my heart and mind that Mr. Herbert had not deserted his family, in the way that the word is used. I knew that some kind of misfortune had befallen him, and Mr. Drown knew that at the time of that affidavit, and it was kept from me for some time.

Q. I was not asking you about all that. At the time this matter was so delicate upon your mind, to mention the fact that your husband had departed, you joined the Rebecca Lodge, a secret organization in the town of Cleveland, as a widow, did you not?

A. I did not, Mr. Wrightsman.

Judge Dale: Wait a minute. Objected to.

A. Let me answer.

The Court: No, the objection is made, and it is sustained.

Judge Dale: We don't care anything about that, Mrs. Herbert.

Mr. Wrightsman: Only upon this proposition—I don't means in a sense of impropriety at all—but to show that she was a widow in her own contemplation, and that her husband was dead.

The Court: Oh, well, suppose he was. It is apparent here from all this correspondence that they did not know whether he was dead or alive, and that condition existed, and he not having been absent for a sufficient length of time that the law would assume him dead, it would cast a cloud upon the title, which would affect its status, at least. It does not require any explanation.

Mr. Wrightsman:

Q. Do you know A. A. Drown?

A. Mr. Wrightsman, if you will just permit me, aside, if the court will, to make a statement to you: It was so proven, positively proven, that your question there was false, that I never joined the lodge——

263 Judge Bierer: We object to that.

Judge Dale: Never mind that.

A. I never joined the lodge as a widow at all.

Judge Dale: Never mind. We don't care whether you are a Rebecca or not. Just stop there.

Mr. Wrightsman:

Q. Mrs. Herbert, you are acquainted with A. A. Drown?

A. I am.

Q. And Sarah F. Drown?

A. I am acquainted with Mrs. Drown; I don't know that I know her——

Q. L. M. Drown?

A. Yes, I am acquainted with L. M. Drown.

Q. Did you not go to them, and ask them to use their influence with Mr. Wagg in getting him to accept a part of the land in settlement of the mortgage indebtedness?

A. Only just along the line of those letters.

Q. What is that?

A. Only just along the lines of those letters.

Q. Along the lines of those letters?

A. Yes, sir, that's all.

Q. Now, there was no oppression on his part, no pressure that was used, that induced you to go to them and try to negotiate such a settlement as would give you an equity in this land?

A. Yes sir. The oppression was that he claimed to own my home, and I believed that any time he would turn me out of it. Turn me out of it. Besides, I couldn't live on it if he owned it.

Q. And yet, he offered to cut out twenty-five acres, including your home, to you?

Judge **Dale**: I object to that. He didn't offer to do anything of the kind.

264 Mr. **Wrightsman**:

Q. Didn't you so understand his offer at the time you made the deed, and was not that corresponded with him?

A. You have it right there.

Q. Will you please answer.

A. All the way from where my house stood—"I wouldn't turn you out"; they tried to get even right there, even to make their line come up along my north window, was one of their propositions; that is, if I would make the transfer, and I couldn't feel that I would sign anything more for them on such conditions.

Q. Now, you offered to sell fifty-five acres of this land to S. S. Sloan, didn't you, or to Mr. Deem?

Mr. **Clark**: I submit he has gone over that.

Mr. **Wrightsman**: Another proposition.

Mr. **Wrightsman**:

Q. Upon what basis of calculation was it that you offered for sale fifty-five acres?

Judge **Dale**: How?

Mr. **Wrightsman**:

Q. Why did you divide this land into such a fraction as to sell off fifty-five acres to Mr. Deem?

Judge **Dale**: Objected to as immaterial.

Mr. **Wrightsman**:

Q. Was that by virtue of some correspondence or understanding with Mr. Wagg, that it would require fifty-five acres in settlement of his own claims?

A. No, sir; no, sir.

Q. How did you happen to divide it that way?

A. Well, it was just as things happened; I don't know.

Q. Who first suggested that division?

A. I don't know.

Q. Mr. Wagg?

A. It came to my mind on account of its clearing entirely my orchard, you know.

265 Q. Did it come to your mind?

A. That is, it so footed off, that it would just about clear along these lines. The propositions that Mr. Drown made to me, all the way from taking from Mr. Wagg my house stood—and I remarked to him that I would not like to make any transaction of that kind in any way but what would entirely clear all of my home.

Q. Didn't Mr. Wagg first, in his correspondence, first suggest to you, before you said anything to him concerning the matter, that the division should be on the basis of fifty-five acres?

A. I recall no such—No, I do not recall anything of that kind. As has been read to day in their correspondence, Mr. Drown would tell me this correspondence, or parts of it, and he said Mr. Wagg offered once ten acres, and then it came all the way from that, Mr. Wrightsman, up to the twenty-five acre basis.

Q. But that is not my question. My question is this: Didn't Mr. Wagg, in his letters to you and your husband, suggest that fifty-five acres would be acceptable to him, and twenty-five to you, as an entire settlement of this mortgage indebtedness, before any such propositions were made to him by you people?

Judge Dale: Objected to as incompetent, and not the best evidence, and the fact is wholly disputed by the evidence.

Mr. Wrightsman: As to some of these letters, some of them are destroyed.

Judge Dale: You have all of Mr. Wagg's letters.

Mr. Wrightsman: I beg pardon. It is the sworn evidence that some of the letters are lost.

Mr. Clark: Mr. Drown's letters to Mr. Wagg, you are speaking about.

266 Judge Dale: We have read Mr. Wagg's letters to day, most of them.

The Court: Answer the question. Objection overruled.

Judge Dale: Exception.

A. He never made any such proposition to me, as I understand your question. I never received—I don't recall any such proposition as coming from him, as you say, before, or long before, that that would be acceptable to him. Is that your question?

Mr. Wrightsman:

Q. Who first suggested the division, fifty-five acres of land, you or Mr. Wagg?

A. I was the first one that suggested a division, that is, forty acres of land, and from that——

Q. I am not asking you that; I am asking you on the basis of fifty-five acres. Do you know?

A. I don't know as to who got up to fifty-five acres.

Q. Well, that is the answer, you don't know. Are you acquainted with Mrs. Thomas A. Clawson?

A. I am.

Q. One of your near neighbors, and has been for a number of years last past, is that right?

A. She lives north of me, Mr. Wrightsman.

Q. Well, don't that comprehend the question I asked you?

A. It does not always comprehend neighbors, no.

Q. For how long a time has she resided upon the Herbert tract of land?

A. I was asked that question two or three weeks ago.

Q. Yes, ma'am, and you dodged the answers there?

Judge DALE: I object to any such remark from counsel.

The COURT: Yes.

Mr. WRIGHTSMAN: I appreciate that, but it is out of plac
267 for the witness to dodge the questions I put to her.

The COURT: The witness will please confine herself to th questions, and give a direct answer.

A. I will have to think. This is a long interval of time to carr such a matter in my mind——

The COURT: Don't comment on it at all. Just think, if you don' know, until you can answer it. It is not necessary to be definite t a day. The question is, how long she has lived there on the land You can give it in years; something near it.

A. I can give about the exact time, I think, with a little thought

Judge DALE: Just guess at it, as near as you can, and let it go.

A. I think she moved there in the fall of 1902.

Mr. WRIGHTSMAN:

Q. Was she the nearest resident to your house for a considerabl time?

A. Yes.

Q. You visited her, for a considerable time, almost daily, did yo not?

A. No, sir.

Q. Neighbored back and forth?

A. No, sir.

Q. Visited frequently?

A. No, sir, not frequently.

Q. Occasionally?

A. Yes, that would better satisfy it, just occasionally.

Q. Well, now, with reference to the time that your husband returned home, do you remember seeing Mrs. Clawson the evenin of that eventful day at your home?

A. I certainly remember her coming to my home in about fiftee minutes after Mr. Herbert came in.

268 Q. At that time, or shortly thereafter, did you have conversation with her, in which you stated to her that th land, at the time that you sold it to Wagg, was worth a thousan dollars, but that the land is worth a great deal more than that now or words in substance to such effect?

A. I had no such conversation with Mrs. Clawson as to the valu of that land; as to its value of a thousand dollars, or anything lik that.

Q. Did you have a conversation with her in regard to the land concerning your claim to the same?

A. Previous to this time that you refer to, I had spoken to he in a general way, in a casual way, of the great injustice that I though it was that had been perpetrated there in regard to my home, and learned from her at that same time sufficient that gave me—o satisfied me that she and her husband knew or suspected that th title to that land was not good. She told me that they had heard something of that kind over in the Osage country, and that Mr. Clawson had approached Mr. Drown about it.

Q. When did you first make any statements yourself——

A. Well, that was along previous to the return of my husband.

Q. Pardon me. Before you answer my question, I want to state it. How long was it after you had executed this deed to Mr. Wagg, which was in May, 1901, that you first made any—that you first gave any notice to the public, or to lot settlers upon this land, of fifty-five acres, that you had a claim adverse to them, and adverse to Wagg?

Judge Dale: Wait a minute. Objected to as improper cross-examination.

Judge Bierer: And assuming something not in evidence.

269 Judge Dale: It is cross-examination about a matter not brought out in chief at all. It is not proper at this time. When we seek to create an issue of that kind, it will be time enough for them to meet it.

Mr. Wrightsman: It is upon this theory, that silence gives consent; upon the theory of ratification of her previous acts in deeding this land to Wagg, by her continued silence in that regard. I don't mean the theory, now, that counsel suggests, that we are trying to make out a case for the lot owners, but a case of long acquiescence, without any overt act or objection.

Judge Bierer: You are assuming that the notice was given previous to this deed.

Mr. Wrightsman: I mean subsequently, pardon me.

Judge Dale: So far as Mr. Wagg is concerned, I take it that it is immaterial whether she notified anybody or not.

Mr. Wrightsman: It depends upon which side of a case a person sits as to their views.

Judge Dale: The court took the position, I believe, that that was immaterial, when we tried to go into that part of the case.

The Court: Read the question.

Thereupon the question was read by the stenographer.

The Court: Objection sustained.

Mr. Wrightsman: I will put the question in a little different form.

Mr. Wrightsman:

Q. How long was it after May, 1901, that you asserted any adverse claim to Mr. Wagg to this fifty-five acres of land?

A. That I asserted an adverse claim? It was when I learned of the nature of that trust deed from my attorney, and filed a suit immediately.

270 Q. You don't know of anything before you consulted, then, Mr. Clark in regard to this matter.

A. Not of that deed, no. Not of the nature of it. I knew that I had been—that I had been defrauded, but just simply how to reach it, or anything of that ground, or on what ground.

Q. When did you first know that you had been defrauded?

A. Well, on the ground——

Q. I say, when?

A. When did I first know?

Q. Yes.

A. Why, I knew it at the very time they were transacting it.

Q. The very time you signed the deed, you knew they defrauded you?

A. The very time they transacted this, I knew they were defrauding me out of my home.

Q. I beg your pardon?

A. I knew, as one knows things——

Q. When did you first learn that you were being defrauded out of your property—at the time that you executed the deed?

A. All along that line of injustice; I knew that it was an injustice.

Q. I am not asking you about injustice. Did your k-owledge of the fact that you had been defrauded out of this land, as you claim, commence from the time you executed the deed?

A. Well, my actual knowledge of the nature of that deed came, as I stated to you, when I consulted Mr. Clark; of the nature of the fraud.

Q. You didn't know of any additional acts when you consulted him, than you knew before, concerning this transaction?

A. I explained to him very clearly and fully the whole matter.

271 Q. He knew nothing personally, himself, except as your legal adviser, concerning such matters as you stated to him, is that it?

A. He examined that deed. I went to the Recorder's office and made a copy of it, and took it to him, and he examined it, and then it was that he asked me——

Q. I am not asking you what he asked you, the conversation.

A. Well.

Q. And it was upon the examination of this deed alone by Mr. Clark that he told you actual fraud had been committed against you?

A. Yes, sir.

Q. And that was your first knowledge of this matter?

A. The first knowledge that——

Q. Of actual fraud?

A. Of the nature of it.

Q. You have state—Are you acquainted with C. C. Duncan?

A. I am acquainted with him.

Q. Do you know Mrs. W. D. Broadbent?

A. I have seen her; I don't know her.

Q. Well, you know her when you see her, who she is?

A. Yes, I know her when I see her.

Q. Do you know Mr. Givens, concerning who you have a suit now involving an oil well?

A. Yes, I know Mr. Givens.

Q. And Mrs. Clawson. Did you not say to those people that you were satisfied with the settlement that you had made with Mr. Wagg?

Judge DALE: Objected to as incompetent, because indefinite as to time, or circumstances.

272 Mr. WRIGHTSMAN:

Q. Did you at any time express satisfaction of your settlement with Mr. Wagg, to those persons I have named.
A. I did not.

Judge DALE: Wait a minute. Objected to as incompetent.
Judge BIERER: And the time and place not fixed.
The COURT: Objection sustained.

Mr. WRIGHTSMAN:

Q. I will ask you if you have not, since the execution of this deed to Mr. Wagg, in May, 1901, been satisfied with that settlement?
A. I never have; I never have, Mr. Wrightsman. So expressed it to them repeatedly, to Mr. Drown and his family.
Q. Mr. Herbert, speaking of values of land in the vicinity of Cleveland in November, 1900, did you know of the sale of the one hundred and sixty acres of land known as the Kinney land, to Sam Kinney, adjoining the townsite of Cleveland on the north, did you know of that fact?
A. I heard of its being sold under a mortgage.
Q. No, I don't mean under a mortgage.
A. That is the way I heard it.
Q. Well, it was sold under mortgage before that time. I am asking you with reference to November 17, 1900; on the north side of Cleveland, right adjoining it; did you hear of the sale of that land to Sam Kinney by C. E. Vandervoort?
A. Yes, sir, I heard of it.
Q. And didn't you learn that that land sold for twenty-seven hundred dollars, the quarter section?
A. No, sir, I never learned what it sold for, don't recall hearing what it sold for.
Q. And do you know where the Loterette eighty acres of land is situated, right across from the public school, adjoining the townsite of Cleveland, do you know it?
273 A. I do.
Q. You know where it is located?
A. Yes.
Q. Did you know of the fact of that land being sold in 1899?
A. I know that——
Q. In 1899.
A. I know that Mr. Loterette bought it, but I don't know when.
Q. Did you know that it sold at that time for two thousand dollars?
A. I did not know it.
Q. And that it was highly improved at that time; had a large

orchard; an orchard large in the size of the trees, and in numbers, and a brick house.

Judge Dale: Objected to——

A. It had not half the value of mine, Mr. Wrightsman.

Mr. Wrightsman:

Q. I am not asking you for an argument. Your lawyers——

A. It is so far removed from my land——

Q. I am not asking you for that. Do you know of the seventy-nine acres of land adjoining the townsite of Cleveland, on the east thereof, which — sold to Mr. Sloan on April 18, 1901?

A. I know of that tract of land, yes.

Q. Did you know of that selling for $22.85 per acre at that time, or for a total consideration of eighteen hundred and fifteen dollars?

A. I don't know what it sold for.

Q. Did you know of the bottom land, in the creek bottom, joining the townsite of Cleveland on the south and east thereof, known as the Powell tract, consisting of eighty acres, selling on January 24, 1900?

274 A. I know that Mr. Powell bought that land there referred to, but I don't know the time, Mr. Wrightsman.

Q. Did you know that he paid at that time for this land $13.45 an acre?

A. No, sir.

Mr. Clark: Wait a minute. I desire to object to this class of questions, stuffing the record with assumed values that there is no evidence to support.

Mr. Wrightsman: The object is to get the knowledge of this witness as to prevailing prices. She has qualified herself as — the values of land in that community.

A. As to my land.

Mr. Wrightsman: I am asking her if she knows these facts. We will put the witnesses on, and give the gentlemen an opportunity——

The Court: The objection is well taken. The witness should be asked if she knew of the sale, and what price it brought, and that would terminate the matter. This is assuming that it did sell for a certain matter, which is not a proper mode of submitting the question.

Mr. Wrightsman:

Q. Did you know of the sale of a hundred and fifty acres of land to O. A. Mitscher in 1902?

A. Yes.

Q. Now, that was after the railroad had — built to the town of Cleveland, was it not?

A. I know of that sale. I don't know when Mr. Mitscher bought it, whether it was before the railroad was there, or after.

Q. After the railroad survey was located definitely, and construction work commenced, did values in that community, and in the townsite, materially increase, or not?

A. Why, values increased.

275 Q. I don't understand you. A little louder please. Did they materially, considerably, or just slightly.

A. Well, they were considerably disappointed over the railroad's way they treated them in regard to the roundhouse, and it did not increase as much as they had anticipated, is my way of understanding it.

Q. They did not know of the misstatement in regard to the roundhouse for several months after the railroad was in operation, did they?

A. You are stating it in regard to these things, Mr. Wrightsman, and I don't think I was posted in regard to your statements.

Q. I beg your pardon; I tried to express myself with reference to events. I will put the question again. With reference to the event of the final survey and construction work on the Katy railroad, across the townsite of Cleveland, at that time did the value of town property, and property adjacent to the townsite materially increase in value?

A. Oh, yes. A railroad generally brings increase of value, you know.

Q. Was it a considerable increase?

A. Well, as to that I don't know, on account of the statement that I just previously made; their disappointment, in some way, in regard to the Katy's transactions; didn't fulfill their contract, you know.

Q. Isn't it a fact that it was over one year after the railroad was in operation that the townsite of Cleveland was first advised that they would not get the Katy roundhouse?

A. I don't know the time, I am sure. I only heard of their disappointment. But all this land that you have spoken of, Mr. Wrightsman, is so much further removed from Cleveland than mine is, that it is really immaterial as to the value of mine.

276 Q. Well, now, let's get to that argument you have made. Isn't it a fact that the Kinney tract hugs the townsite of Cleveland as close as it can get to it on the north?

A. On the north it does.

Q. And isn't it a fact that it joins yours on the north, corners with it?

A. Well, I think there is a street between mine and it.

Q. So that hundred and sixty acres is just as close to the townsite as yours, isn't it?

A. That could hardly be, no sir; it extends away over, you know, the hundred and sixty does. It would have to extend a considerable distance to be a hundred and sixty acres of land.

Q. Well, now, let me understand that. I want to get that. The Kinney land joins your line on the north, and the eighty acres of the original townsite of Cleveland on the north, don't it?

A. Yes.

Q. Well, isn't it just as near to the town of Cleveland, joining it on the north, as your land, joining the townsite of Cleveland on the west is?

A. It is not as near to that——

Judge Dale: Wait a minute. I object to that, as incompetent, because argumentative, and calling for a conclusion.

The Court: Objection sustained.

Mr. Wrightsman:

Q. Mrs. Herbert, you have testified that this fifty-acres belongs to you, and that Mr. Wagg only had a mortgage upon the same, or a right to only so much money concerning the same. Now, before you advised with Mr. Clark, don't you know that any rights concerning this land that you may have in behalf of such portions respectively as were occupied by each and all of the defendants named in your petition was held — was improved, and in the possession of
277 those persons, without any objection of yours, prior to this suit?

Mr. Clark: Wait a minute. We object to that as no part of the cross-examination.

The Court: Objection sustained.

Mr. Wrightsman: Exception.

Mr. Wrightsman:

Q. Mrs. Herbert, you have given an oil and gas lease upon this entire fifty-five acres of land to a man by the name of Scales, Henry M. Scales, have you not?

Judge Dale: Objected to as incompetent, and not the best evidence.

Judge Bierer: And improper cross-examination.

The Court: Objection sustained.

Mr. Wrightsman: I believe that is all.

Redirect examination by Judge Dale:

Q. Mrs. Herbert, you have been asked with reference to your offer of that fifty acres——

Mr. Biddison: Should the ordinary method of examination be changed?

Judge Dale: What is the ordinary method?

Mr. Biddison: The ordinary method is to confine it to the same counsel. If you change, we want the same privilege on cross-examination. We object to any other but the original counsel examining.

The Court: Oh, objection overruled. Go ahead. I don't care if you all examine.

Judge Dale:

Q. Mrs. Herbert, did you offer this fifty acres for the price suggested because you thought it was all the land was worth, or because you thought that the only way in which you could save a part of your home?

278 Mr. BIDDISON: Objected to as leading and suggestive.

Mr. WRIGHTSMAN: And a reiteration, and argumentative, and not proper rebuttal testimony—re-direct, I mean.

Judge DALE: This was brought out on cross-examination in Mr. Wrightsman's inquiries with reference to Sloan.

Mr. WRIGHTSMAN: She stated the same thing in direct-examination to these gentlemen.

Judge DALE: I want to show, if she made these offers, why she made them, is all.

The COURT: Well, the cross-examination was in a proper field.

Judge DALE: This is a matter brought out by them.

The COURT: It does not entitle you to ask leading questions.

Judge DALE: They brought out the fact that she had made the offer to these parties of fifty acres of this land at the certain price, either thirteen hundred or fourteen hundred and fifty dollars.

The COURT: She testified in examination in chief about depositing this money in the bank, and then the cross-examination developed the fact that they were to get a portion of the land for the money.

Judge DALE:

Q. I will ask you whether or not at the time you made, or had, the negotiations with these parties, you believed that that was all the land was worth?

Mr. WRIGHTSMAN: Wait a minute. Objected to as leading and suggestive, and calling for a conclusion.

The COURT: Objection sustained.

Judge DALE:

Q. At the time you made the offer of that piece of land, why did you do it?

279 Mr. WRIGHTSMAN: Objected to as a reiteration.

Mr. BIDDISON: And immaterial.

The COURT: Overruled.

Mr. BIDDISON: Exception.

Judge DALE:

Q. Answer the question.

A. Why I made the offer?

Q. Yes.

A. Why, because of Mr. Wagg holding this escrow deed over me as a title to the land, and because it seemed to me the only way possible for me out of the difficulty to secure a home: Not because I did not think and know that the land was of a much greater value than that.

Q. Now, Mrs. Herbert, I will ask you what Mr. Wagg was proposing to give you at that time, in the way of land provided you would execute this deed?

Mr. BIDDISON: Objected to as not the best evidence, irrelevant and immaterial.

The Court: Well, if it is the propositions contained in the letters, it is not competent; if it was propositions made otherwise it would be. She had some talks with Drown, and had some talk with Wagg himself.

A. Well, all the way from a piece of land, as he expressed it in his letters, a piece——

The Court: Well, what he expressed in his letters you will not repeat.

Judge Dale: Did Mr. Drown make any statement to you as to how much Wagg would give you?

A. It was along that same line; all the way from a piece to ten acres, and twenty acres.

Q. That was in accordance with his letters?

A. Yes, sir.

280 Q. When was oil first found in that vicinity?

A. July 3, 1904; last year.

Q. You may state whether or not the citizens of Cleveland ever attempted, by force, or any other way, to get possession of this eighty acre tract for townsite purposes?

Mr. Biddison: Objected to.

The Court: Who did?

Judge Dale: The citizens of the town of Cleveland. I want to show it was valuable for that purpose, as shown by the attempts to get possession of it for that purpose.

Mr. Wrightsman: What time, Judge?

Judge Dale: Any time.

Mr. Wrightsman: Objected to as incompetent, irrelevant, and immaterial, and not proper re-direct-examination, a part of their case that they have heretofore presented. They went into that matter on direct-examination, and the statement in regard to jumping townsites, and also a letter written to Mr. Herbert concerning the matter.

The Court: I don't think he asked the witness about it.

Judge Dale:

Q. You can answer.

A. Why, they had always tried to get a claim on it.

Q. Now, you may state what, if any, action was taken, and be brief about it.

Mr. Biddison: Objected to as irrelevant, and immaterial.

The Court: I don't see how that would cut any figure, whether they were trying to get it or not.

Judge Dale: In this way: To show the adaptability for that purpose, and the desirability for that purpose.

The Court: Well, if they were trying to buy it, it might; but if they were trying to steal it, they would take it where they could get it, whether it was desirable or undesirable. They would
281 take creek bottom, if they could get it for nothing.

Judge Dale: If this was particularly desired for that purpose, it might affect its value. Just a brief statement is all.

The COURT: As I understand from the correspondence, they tried to jump it because they thought the title of Herbert had been cancelled, and they were trying to get a free townsite.

Mr. WRIGHTSMAN: Yes, sir, that is the fact; and a lot of people went down there from Pawnee at that time.

Judge DALE:

Q. Mr. Herbert and you were living on that land at that time?

A. Yes sir.

Q. He had a filing on it?

A. Yes, sir.

Q. When was that?

A. Well, the first was that they sent for Mr. Herbert, the Cleveland Townsite Company did——

Q. Never mind that. When was it they jumped it?

A. That was the 17th of April, 1894.

Q. How many went on there?

A. Well, it was estimated about a hundred people.

Q. Went on there and staked lots?

A. Yes sir.

Q. You had a contest in the land office, your husband did?

A. Yes, sir. The Cleveland Townsite Company put a contest on, but this jumping was mostly from Pawnee, and Cleveland people joined in with them.

Q. It was decided adversely to the townsite people?

A. Yes, sir, and they appealed it. It was decided for my husband both times.

282 Q. This Loterette land, where does that lie?

A. The Loterette land.

Q. Yes.

A. That is northeast of Cleveland.

Q. How far?

A. Well, let's see——

Q. Well, never mind, if you can't tell.

A. Three or four blocks.

Q. I say never mind; we don't care anything about it anyhow.

Mr. WRIGHTMAN: We would like for her to state it, Judge.

Mr. CLARK: You know where it is, don't you?

Mr. WRIGHTSMAN: Right across from the school house.

The COURT: Well, she don't know anything about what it sold for, and there is no use to take up the time examining her about it.

Judge DALE:

Q. Mrs. Herbert, I will ask you, in reference to the sale of this portion of this land, if the fact that Mr. Wagg had a deed to it influenced purchasers in any way that you would try to get?

A. Yes, sir, it influenced purchasers as throwing a cloud—as preventing my obtaining——

Q. When did you first learn that you had the absolute title to this land, and a perfect right to convey it without your husband joining in the deed? Did you learn that from Mr. Clark for the first time?

A. Yes, sir.

Q. Was there any talk about town there as to the title to this property being in question?

A. Oh, yes, a great deal. That was the current report in Cleveland, that L. M. Drown was trying to sell land to which he had no title or right.

283 Q. That kept down prices somewhat?

A. Yes, sir.

Judge Dale: That's all.

Cross-examination by Mr. Biddison:

Q. This matter of jumping this claim had all be- settled long before the execution of this mortgage, hadn't it?

A. Oh, it was settled, I suppose; it was settled when my husband received the deed from the government.

Q. I am not asking you when your husband received the deed from the government; can you answer that question?

Mr. Clark: I submit she has.

Judge Dale: I object to that as improper. She has given the very best answer possible to the question. When the government gave them the deed, it was settled then.

The Court: Objection sustained.

Mr. Biddison:

Q. When, with reference to the time the mortgage was executed by your husband on this land, was the townsite jumping all over, and the jumpers all gone?

A. I don't know that I understand that question, Mr. Biddison.

Q. Read the question.

Thereupon the question was read by the stenographer.

A. I don't know as to being gone. I think they resided at Pawnee and Cleveland.

Q. Did they reside on this land at the time you executed the mortgage on it, any of them?

A. Oh, no.

Q. They had been gone from the land for some years, had they not?

A. I don't recall whether this man McKee was still living in his house that Judge Eagleton claimed at that time or not; No, I think not; I think he had moved off, and Judge Eagleton had rented it. That is the way I think about it now. 284

Q. All the balance of them were gone?

A. I was living there alone on the tract of land, and my residence and this one that Judge Eagleton refers to were the only two houses.

Q. And somebody was living in the house that Judge Eagleton claimed at that time?

A. He was renting it, I understood.

Q. And that is the house that has been spoken of in these letters here, that is referred to, not to let these parties pay rent to anybody but Mr. Wagg, the parties living in that house?

A. I suppose that was the reference.

Q. You say that prior to the execution of the deed to Wagg, you had been making an effort to sell the land, or portions of it?

A. To pay off this indebtedness. Prior to the execution of what deed do you mean?

Q. Prior to the execution of the deed, the last deed to Wagg?

A. Yes.

Q. You had been trying to sell portions of this land?

A. Yes.

Q. To pay off the indebtedness?

A. Yes.

Q. And you say at the time you executed that deed to the land, that the land was of very much greater value?

A. I certainly——

Judge Dale: She so stated before, to Mr. Wrightsman.

The Court: Yes, don't re-examine on the same matters, please.

Mr. Biddison:

Q. Had you been able to get any higher offers for portions of that land, than those you had agreed to accept from Sloan and Deem?

285 Judge Bierer: Objected to as improper re-cross-examination, and a repetition. They have gone all over that.

The Court: Objection sustained.

Mr. Biddison: Exception.

Mr. Biddison:

Q. What was the best offer you had been able to obtain for that land at that time?

Judge Bierer: Objected to as improper re-cross-examination, and a repetition.

The Court: Well, it is not proper re-direct. I don't remember that she was ever asked it. Objection sustained.

Mr. Biddison: Exception.

Mr. Biddison:

Q. What did you take as your basis of values, in determining the value of that tract of land?

Judge Bierer: I object to that as improper re-cross-examination, and a repetition.

The Court: Objection sustained. Mr. Biddison, if you want to recall the witness for re-cross-examination, and open up the case again, it is another proposition; but the witness was examined, and turned over to the other side for re-direct, and passed the stage of cross-examination, except as to re-direct matters.

Mr. Biddison: This matter that I am asking about now——

The Court: It is all original matter. It would have been proper on cross-examination, perhaps.

Mr. Biddison: This was gone into by Judge Dale: She made the statement that she regarded it as of a very much greater value——

The Court: Oh, you have been over that sufficiently. We won't get through with this case this week, if you are going into that, on her knowledge of values.

286 Mr. Clark: The Court will have to grant our application for a continuance yet.

The Court: I am afraid so, but I don't want to have to.

Mr. Biddison:

Q. In what way did Mr. Wagg's deed to this land cast a cloud on the title when you were trying to sell it to any one?

Judge Bierer: Objected to as not proper re-cross-examination, and a repetition.

The Court: That is too apparent to need explanation from the witness.

Mr. Biddison: Exception.

Mr. Biddison:

Q. What objections were made, if any, to you to the title to that land, when you were trying to sell it?

The Court: Well, she stated that awhile ago, that it was because her husband had not signed the deed.

Mr. Biddison:

Q. Was there any other objection made to it besides that, that your husband had not signed the deed?

Judge Bierer: We object as improper re-cross-examination, and a repetition.

A. People asked me the meaning of this trust deed that was on record. They said: "Mrs. Herbert, what does that mean? I examined the record at Pawnee and I find there is a deed thereon record"; and they would confront me with that, and then they would go to Mr. Drown about it. And I don't know as to what he would state, except that it was always in Mr. Wagg's favor, and as against me.

Mr. Biddison:

Q. Did you tell those people that you were making this sale for the purpose of paying off that deed and mortgage?

Judge Bierer: Objected to as improper re-cross-examination and a repetition.

The Court: Objection sustained.

Mr. Biddison: Exception.

287 Mr. Biddison:

Q. What do you know about Mr. Drown always stating it in Mr. Wagg's favor, and against you, if you did not hear the statement?

Judge BIERER: Objected to as improper re-cross-examination.

The COURT: It is wholly immaterial, anyway.

Mr. BIDDISON: Exception. That is all.

Judge DALE: That is all, Mrs. Herbert.

Mr. WRIGHTSMAN: The defendant moves the court to exclude rom consideration the testimony of the witness Herbert, in so far s the same pertains to the value of the land in controversy at the ime of its purported sale to Mr. Wagg, or at the time of May 6, 901, for the reason that it appears to be incompetent, and there is o basis therefor.

The COURT: The evidence would be of some value to the court ny way. It would not be proper to exclude it. It only goes to its veight. Some courts hold that a person residing on land, and own-ng it, may give an opinion of the value, even if they don't know f any sales at all.

Judge BIERER: There may not have been a sale there for ten years, nd yet there would be a value.

The COURT: Their judgment may not be worth very much, but ome courts hold that a person is competent to give their judgment f the value of their own land.

Mr. BIDDISON: If the court please, in the matter of the witness Mr. Litten, I would like to have him recalled, either this evening or omorrow morning, for the purpose of laying the foundation for im-eachment, to show that he testified on the former trial of this case hat the land was worth fifty dollars, instead of a hundred.

The COURT: It was announced that they called him out of
288 order, for the reason that he wanted to go home. If he is
here you can call him, if not, I will not call him back.

Judge DALE: He wanted to go home, he had his family here, nd we put him on the stand so that we might excuse him.

Thereupon court adjourned until 8:30 o'clock A. M., May 19, 905.

May 8:30 o'clock A. M., May 19, 1905, the hour to which an adournment was taken, court convened pursuant to adjournment, and hereupon the following proceedings were had and done, to wit:

The COURT: Call your next witness, gentlemen:

SIMEON MOTT, being produced and sworn as a witness on behalf f the plaintiff, testified as follows:

Direct examination by Judge DALE:

Q. You may state your name to the court.

A. Simeon Mott.

Q. Where do you live, Mr. Mott?

A. I live at Keystone, Pawnee County.

Q. Where is that from this place, Mr. Mott?

A. It is in the extreme southeastern portion of the county.

Q. Have you ever lived at any other place in this county?

A. Yes.

Q. Where?

A. I have lived in Pawnee.
Q. How long?
A. How?
Q. How long did you live in Pawnee?
A. Four years.
Q. How long have you lived in this county?
A. Since the opening.
Q. What is your business, or occupation, or profession?
289 A. Why, at the present time?
Q. Yes, sir.
A. I am a carpenter.
Q. What has been your business in the past?
A. Surveying.
Q. Were you county surveyor—Well, are you a land owner in this county?
A. Yes.
Q. A farmer, also. Did you ever occupy any official position in this county?
A. I have.
Q. What was it?
A. County surveyor.
Q. For how long were you county surveyor?
A. Six years.
Q. During what time?
A. From January, 1897, the following six years.
Q. Are you acquainted with the location of lands in Pawnee County pretty generally?
A. Yes, fairly well, I think.
Q. You surveyed considerable throughout the county?
A. Yes.
Q. Are you acquainted with the eighty acre tract known as the Herbert-Wagg tract, immediate west of the old town of Cleveland?
A. I am.
Q. Did you do any surveying upon that eighty acre tract?
A. I did.
Q. At whose instance did you make any survey there?
A. At the instance of—a portion of it, Mr. Drown, I think, Mr. Roy Drown.
290 Q. At what time did you first—Did you subdivide this land for Mr. Drown and Mrs. Herbert?
A. Yes, I did.
Q. Did you afterwards subdivide the fifty-five acres into town lots?
A. Yes.
Q. At what time was that survey made, subdividing the land into town lots?
A. I think it was in July. 1901, if I remember correctly.
Q. Do you know at what time the plat was filed?
A. The subdivision into town lots was in August, I think.
Q. The other was made previous?
A. Yes.
Q. July?

A. I think it was; I wouldn't be positive about the date.

Q. It was platted as a townsite in August, 1901, is that correct?

A. Yes, sir.

Q. Who employed you to subdivide the fifty-five acres into town lots?

A. Mr. Drown.

Q. Mr. Roy Drown?

A. Yes, sir.

Q. How does this land lie with reference to the old town of Cleveland, immediately west of it?

A. Yes, sir.

Q. You may state whether or not that time it was desirable for townsite purposes, if it laid nicely, describe it to the court.

A. Why, yes, I think it laid fairly well for townsite purposes; there is the portion known as the old townsite of Cleveland.

Q. To that portion?

A. Yes, I think so.

291 Q. Do you know whether or not since that time this Wagg addition has been used for townsite purposes?

A. Yes.

Q. Do you know about how long it was after you laid it out it was until they began putting up residences there?

A. Why, in a very short time there were a few houses went up.

Q. Mr. Mott, are you acquainted with the values of lands in Pawnee county, the market value of lands in different locations of Pawnee county?

A. Why, to some extent, yes.

Q. Have you known of sales of properties in different portions of the county, and know what people held them at?

A. Yes.

Q. And what they sold them for. Have you heard what lands sell for?

A. At that time?

Q. Yes, or about that time.

A. Yes, I could call to mind some pieces of land.

Q. You know how this particular land in question was lying with reference to the old townsite of Cleveland, and its desirability for townsite purposes, you say?

A. Yes.

Q. In your judgment, what was the reasonable market value per acre of that fifty-five acres, for such purpose, along in December, 1901?

Mr. Biddison: Objected to, for the reason that the competency of the witness is not shown.

The Court: The witness has testified that he knew generally about values, but this being valued particularly for a certain purpose, it must be shown that he had some knowledge of values in that vicinity.

292 Judge Dale:

Q. Mr. Mott, do you know from the location of this land, the purpose for which it was best adapted, have you known as to the reasonable market value of that land?

A. Yes, I think I have.

Q. For what purpose, in your judgment, was it best adapted, and most valuable for?

Mr. **Biddison**: At what time, Judge?

Judge **Dale**:

Q. In summer of 1901.

A. Townsite purposes.

Q. Now, for townsite purposes, have you an opinion as to the reasonable market value of that land at that time?

A. Why, yes.

Q. How did you arrive at such opinion, what is your——

A. Why, by the price that they put upon the lots, is all the way I have.

The **Court**:

Q. What?

A. The price they put upon the lots, after it was surveyed.

Judge **Dale**:

Q. That is, the price the other party put upon it?

A. Yes.

Q. Well, independently of that, knowing the town of Cleveland—you were familiar with that town, were you not?

A. Yes, considerably so.

Q. Knew of its size, its location, etc. Now, taking into consideration those facts and circumstances, what, in your judgment, was the reasonable market value, per acre, of that fifty-five acres, for townsite purposes at that time?

Mr. **Biddison**: Objected to as irrelevant, and immaterial, and the competency of the witness not shown.

The **Court**: Overruled.

Mr. **Biddison**: Exception.

Judge **Dale**:

Q. You may answer the question, Mr. Mott.

293 A. Why, after it was put upon the market as town lots——

Mr. **Biddison**: Now, we object to the further answer.

Judge **Dale**:

Q. Well, I am just asking per acre, for the value of those fifty-five acres, Mr. Mott. It is immaterial whether——

The **Court**:

Q. What would it have sold for as an entire body, reasonable cash value?

Judge **Dale**:

Q. What would it have sold for, per acre, as an entire body, for any purpose for which it was most valuable?

A. I don't know as I understand the question.

Q. Well, I want, simply, to get at your judgment of the reasonable market value of this fifty-five acres tract of land, per acre, considering its prospects, and the location of the town of Cleveland, and the prospects for the town of Cleveland; what, in your judgment, was the reasonable salable, market value of that fifty-five acres?

Mr. Biddison: That is objected to, as calling for a speculative answer, and argumentative.

The Court: Oberruled.

Mr. Biddison: Exception.

Judge Dale:

Q. You may answer the question, the court says; the question which I have propounded.

A. Well, as I started to state before, the price that they put upon the lots——

Mr. Biddison: To that we object.

The Court: Yes, that is not a proper basis, because they might not have ever sold any.

The Court:

Q. Mr. Mott, if you are able, answer; or if you have a judgment on the question. What would the fifty-five acres of land have sold for, if it had been offered for sale on reasonable cash terms at that time, as a whole, considering any purpose for which it might be used?

294 A. Sold by the acre?

Q. No, sold as a whole, the fifty-five acres in a body.

A. Well, I don't know.

Q. He asks you to price it per acre.

Judge Dale:

Q. So much per acre.

A. I can't state.

Q. Have you no judgment as to the acre value of the entire tract of fifty-five acres?

A. Yes, I have a judgment, but I heard of nobody that wanted to buy, and I couldn't say. My judgment would have been that it would have been worth fifty dollars an acre.

Q. For what purpose?

A. Why, for—not that, even, for farming purposes; but it is close to the town, lying right by the town there; and its future prospects.

Q. Did you say it was desirable for townsite purposes?

A. Yes, sir.

Q. And you say that for townsite purposes it was worth but fifty dollars an acre?

A. No.

Q. Well, how much was it worth for townsite purposes?

Mr. Biddison: Objected to, for the reason that the competency of the witness is not shown.

A. I could only answer that as to the time after it became a townsite.

Judge **Dale**:

Q. Well, assuming now that it was a townsite.
A. After it became a townsite, and laid out in lots, it was worth a hundred dollars an acre, I suppose.
Q. You think that would be the reasonable value of the land for that purpose?
A. Yes.

295 Judge **Dale**: Cross-examine.

Cross-examination by Mr. **Biddison**:

Q. What do you base that estimate of a hundred dollars an acre on, Mr. Mott?
A. Why, the price that they put the lots at.
Q. Do you know what the lots sold for, on an average, in that addition, when they were put upon the market?
A. I know some of them were priced to me for twenty to, I think, thirty-five dollars a lot.
Q. That is, after the streets and alleys had been surveyed out?
A. Yes, sir.
Q. Do you know how many lots there was to the acre?
A. I think there was about five.
Q. Will you state the size of those lots?
A. I think the full blocks contained lots 50 x 150; I wouldn't be sure; I would have to see the plat.
Q. Wouldn't there be only about three of that size in an acre, Mr. Mott?
A. Then there were smaller lots.
Q. Wouldn't there be only about three lots in an acre of that size?
A. Yes, there would be more that that.
Q. Wouldn't be four, would there?

Judge **Dale**: I expect the court knows about how land is cut up. I have cut up a little of it.

Mr. **Biddison**:

Q. I will ask you if you know how many lots there was made out of the whole fifty-five acres?
A. I do not now know.
Q. Can you refresh your memory by reference to the plat?
296 A. I could.
Q. Is that the plat you made at that time? Is that the plat that you made?

Handing the witness a plat.

A. Yes.

Mr. —. We offer it in evidence, for the purpose of showing the extent of it.

Judge **Dale**: Just a moment.

Judge DALE:

Q. This here is the Wagg property, the whole of it?
A. Yes, sir.
Q. The fifty-five acres?
A. Yes, sir.

Judge DALE: That would be one hundred and eighty-nine lots. No objection to the plat. Let it be considered in evidence.

Mr. BIDDISON:

Q. You say these lots were offered to you from twenty to thirty dollars?
A. Yes.
Judge DALE: Twenty to thirty-five, I believe you said.
A. Yes, sir.

Mr. BIDDISON:

Q. Those were the better class of lots priced to you at that price?
A. No. The cheaper lots were some of those fractions on the west.
Q. They were priced at a less price than that?
A. No, not less than twenty.
Q. And the highest was thirty-five?
A. I think so, yes.
Q. Did you know of any other lands selling in that vicinity about that time, Mr. Mott?
A. No.
Q. Did you at that time have any general knowledge of the market value of lands in that vicinity?
297 A. Yes.
Q. Where were you living at that time, Mr. Mott?
A. I lived in Pawnee.
Q. Had you ever lived in Cleveland?
A. No.
Q. How close was the nearest you ever lived to Cleveland?
A. Sennett neighborhood.
Q. About how far?
A. Twenty miles.
Q. When you were there you were farming?
A. Yes.
Q. Was Cleveland your trading point?
A. No, not generally speaking.

Mr. BIDDISON: That's all.

Redirect examination by Judge DALE:

Q. Mr. Mott, when you came to Pawnee, did you come through Cleveland from your place of residence?
A. Yes.
Q. That was your usual route of travel?
A. Yes, sir.
Q. Did Mr. Drown price the best of these lots to you at thirty-five dollars?

A. No, I didn't ask the price of those lying right along near th old townsite.

Q. You don't know what he held those at?

A. No, I do not.

Q. You say the twenty-dollar lots were the fractional lots?

A. Yes, I think so.

Q. And the thirty-five dollar lots were not the best lots?

A. No.

298 Q. Do you know what he held the best lots at?

A. No, I do not.

Judge Dale: That's all.

Recross-examination by Mr. Biddison:

Q. When those lots were actually sold along there, those best lot do you know what they actually sold for, Mr. Mott?

A. I do not.

Q. You don't know what the lots throughout that addition sol for when they were actually sold?

A. No, I don't know that I do; I don't remember.

Mr. Biddison: That's all.

Judge Dale: That's all.

John R. Skinner, being produced and sworn as a witness on be half of the plaintiff, testifies as follows:

Direct examination by Judge Dale:

Q. Where do you live, Mr. Skinner?

A. I live near Terlton; five miles west.

Q. Did you ever live at Cleveland?

A. No, sir.

Q. How near did you ever live to that city?

A. I am living nearer there now than I ever lived before.

Q. How far is that?

A. About seven miles.

Q. Is Cleveland your trading point?

A. Some little; very little.

Q. What is your business, or occupation?

A. I am a farmer.

Q. Were you familiar with the town of Cleveland in the summe of 1901?

A. Well, yes, sir, somewhat.

299 Q. You know the location of this Herbert eighty-acre tract

A. Yes, sir, I knew that very well.

Q. You know how it lies to the City of Cleveland, do you?

A. Well, it lies right joining the city of Cleveland.

Q. You know the character of the land?

A. Yes sir.

Q. You are acquainted with Mrs. Herbert?

A. Yes, sir. I did know Mr. Herbert before he died.

Q. Were you, in the summer of 1901, acquainted with the value of lands in and about the town of Cleveland?

A. Well, I don't know that I would be an expert on that. The land laid very nice; a very nice piece of land, for farming purposes; it was a very desirable piece of land.

Q. How about the desirability of it for an addition to the town of Cleveland?

A. Well, it laid very pretty for that, I thought.

Q. I will ask you, Mr. Skinner, if the location of that land to the town of Cleveland was such as to create the reasonable belief that as the town grew it would go over on to this land?

A. Yes, sir, it appeared very plausible.

Q. How near was the business portion of Cleveland to this particular tract of land?

A. Well, I think about two blocks, perhaps; perhaps three, two, I think.

Q. What was the main business street of Cleveland at that time?

A. I don't know, sir, that I could tell the name of it; but it was about two blocks from the main business part of the town.

Q. Was the business part of old Cleveland to the west side of the town, or to the east?

A. Sir?

Q. Was the main business part of old Cleveland to the west part of Cleveland, or to the east part of Cleveland?

300 A. East; east of this land.

Q. I mean the old town of Cleveland, the eighty acres——

A. It was west; the eighty acres was immediately west.

Q. Now, in the town of Cleveland, where was the main business street?

A. Well, I don't know that I am familiar with the names, except possibly with the man that run that hotel, and the first bank that started there, and Martin, and I believe several of the business men. I didn't know the names of the streets.

Q. Mr. Skinner, how long have you lived down in that vicinity?

A. I have not lived there very long; only about six months,—about five months.

Q. How long have you lived in the vicinity of Cleveland?

A. I lived in Blackburn ever since the opening.

Q. Ever since the opening of the country?

A. Yes, sir.

Q. I will ask you if you ever made a particular examination of this eighty-acre tract in question, before it was platted, with a view to purchasing it and platting it for townsite purposes, or going in with others and platting it for townsite purposes?

A. Yes, sir, *h*e had such a thought at one time.

Q. At what time?

A. I think it was in '95.

Q. 1895?

A. Yes, sir.

Q. Mr. Skinner, did you inquire as to the values of land in and about that town at that time?

A. No, sir; no, sir.

Q. Did you afterward made any inquiry, or learn, about the values of land in and about the town of Cleveland?

A. No, sir.

301 Q. Do you know what lands were held at in and around there?

A. Yes, sir, I had an idea of the value of land.

Q. How did you get that idea, Mr. Skinner?

A. Two purposes; for farming purposes it was a very nice piece of land, without any prospects of a town; the piece of land laid very nice, and such land anywhere in Pawnee County would bring fifty dollars an acre now; and, in fact, I think a very fair value would be fifty dollars an acre for that land, for farming purposes.

Q. Now, taking into consideration the way it laid to the town of Pawnee—Cleveland, and its desirability for platting purposes, and the prospects of the growth of Cleveland, what would you say the reasonable market value of that land per acre was in the year 1901?

Mr. Biddison: Objected to, for the reason that the competency of the witness is not shown.

The Court: Overruled.

Mr. Biddison: Exception.

A. What was the question, please?

Judge Dale:

Q. Taking into consideration its desirability for platting purposes, as an addition to the town of Cleveland, in 1901, the summer of 1901.

A. Well, the prospects then were not very flattering for the town.

Q. Well, assuming that there were not very flattering, but taking into question, now, the town of Cleveland, its probable future whatever it might be, as that might appeal to the natural judgment of persons, and the desirability of this tract of land for townsite purposes, what do you say its reasonable value was?

A. Well, with the prospects of a growing town there, it would have been a very good investment at a hundred dollars an acre, I think.

302 Judge Dale: Cross-examine.

Cross-examination by Mr. Biddison:

Q. There was no prospect of a growing town there then, was there?

A. Well, the town had about matured then; there was no prospect.

Q. In the spring of 1901 was about the dark days for Cleveland, was it not?

A. I think later on was worst.

Q. It got worse after that?

A. I think so, yes, sir.

Q. You was residing at that time at Blackburn?

A. Yes, sir.

Q. Were you frequently down to Cleveland in the year 1901, the spring?

A. Yes, sir, several times.

Q. You were seeking investments down in that country, were you?

A. Well, I always thought a good deal of Cleveland, but it looked very gloomy, to go and look; but I had a desire to get in there.

Q. It looked good, if the town made a town?

A. Yes, sir.

Q. Nice location for a town?

A. Yes, sir.

Q. Did you know of any lands selling for townsite purposes in or about Cleveland at that time?

A. No, sir, I was not familiar with any sales made there.

Q. Do you know whether or not there was a demand in that section or in or about that town, for an addition to the town in the spring of 1901?

A. I don't know, no, sir.

Q. Do you recall the fact as to whether or not a large part of the town of Cleveland, the original town, and lots adjoining this tract, were selling, at that time for taxes? 303

Judge **Dale**: I object to that as immaterial.

A. I am not very familiar with that, but I think that some did, perhaps.

Judge **Dale**: Objected to as assuming.

The **Court**: It is not proving the fact; it is simply asking him for his information on the subject.

Judge **Dale**: He is assuming the fact, and then asking the witness.

Mr. **Biddison**:

Q. There was a great deal of vacant property in Cleveland at that time?

A. Yes, sir, I think so.

Q. And a good deal of it on the side of the town next to this tract of land, wasn't it?

A. Well, I don't know, sir, that I could locate it, but I think there was some vacant lots in there.

Mr. **Biddison**: That is all.

Judge **Dale**: That's all, Mr. Skinner.

Mr. **Wrightsman**: I want to recall Mrs. Herbert for further cross-examination, a couple of matters that I overlooked, with the consent of the court.

Judge **Dale**: She will probably be on the stand again.

Mr. **Wrightsman**: All right.

**Charles Nash**, being produced and sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by **Mr. Clark**:

Q. State your name.

A. Charles Nash.

304 Q. Where do you reside?

A. In the Cherokee country.

Q. What is your business at this time?

A. Farming.

Q. How long have you resided there?

A. Three years.

Q. Where did you reside before going there?

A. Cleveland.

Q. What business were you engaged in at Cleveland?

A. In the hotel business a part of the time.

Q. Do you know the plaintiff, Mary B. Herbert?

A. Yes, sir.

Q. Whereabouts was the hotel which you was living in, in reference to the eighty acres known as the Herbert eighty, joining Cleveland on the west?

A. Well, the Herbert eighty joined the land that the hotel was on, I believe on the west.

Q. Joined the lot, you mean?

A. Joined the lot, yes sir.

Q. The eighty acres came right up to the lot on which the hotel was situated where you did business?

A. Yes, sir.

Q. What hotel was that?

A. I believe we called it The City Hotel then.

Q. Do you know what name it goes by now?

**Mr. Wrightsman**: Objected to as immaterial.

**Mr. Clark**:

Q. I will ask you whether or not you ever met Mr. Wagg, the defendant in this case?

A. Yes, sir, I did meet Mr. Wagg at one time; I believe only one.

Q. About when was that?

A. That was five years ago. It would be in 1900, I be-
305 lieve. Along there. I couldn't say when. That was along
some time in the summer.

Q. Did you have any conversation with him at that time?

A. Just a very little.

Q. Was the subject of your conversation the eighty acres in controversy?

**Mr. Wrightsman**: Wait a minute. Objected to as leading and suggestive.

**Mr. Clark**: I don't want to ask him about anything else.

**The Court**: Oh, he may answer that question.

**Mr. Clark:**

Q. I will ask you whether or not it was upon the subject of the Herbert eighty acres of land, and the hay growing upon it?
A. Just for the hay.
Q. Just for the hay?
A. Yes, sir.
Q. On the eighty acres in question?
A. Yes, sir.
Q. Now, I will ask you to state the conversation between you and Mr. Wagg.

Mr. Biddison: Objected to as irrelevant and immaterial.
Mr. Wrightsman: And the proper foundation not laid, as to time and place.
The Court: Overruled.
Mr. Biddison: Exception.

A. I didn't understand the question, Mr. Clark.

**Mr. Clark:**

Q. State the conversation you had with Mr. Wagg at that time.
A. I met Mr. Wagg and Mr. Drown on the street——
Q. What Drown was that?
A. What town?
306 Q. Which Drown?
A. The old gentleman Drown.
Q. A. A. Drown, the father of Roy?
A. The father of Roy; I wouldn't say A. A.
Q. Where did you meet him?
A. Along in the evening, about milking time.
Q. Go on and tell the conversation you had with Mr. Drown and Mr. Wagg.
A. I met Mr. Drown and Mr. Wagg. I believe Mr. Drown was out milking, or going to milk, and I went up to him and said something about the hay, and Mr. Wagg was coming along up towards him, and Mr. Drown introduced me to Mr. Wagg and I asked Mr. Wagg about the hay, told him I had been to see Mrs. Herbert about it, and told him I was trying to buy the hay, wanted to buy the hay, or something like that, and he said that if I bought the hay, to buy it of them, that they had it in their possession now; they had that land in their possession, and they had taken charge of the hay. And I asked him what he wanted for the hay, and he told me to make a deal with Mr. Drown. And I asked him what he asked me for the hay and he says, "Whatever deal you make with Mr. Drown, for the hay, it is all right"; and I walked along down to where Mr. Drown was, and asked him what he wanted for the hay, and asked him what they were going to do with it, and he said they were going to cut it. And I asked him if they were going to sell it, and he said he was not particular, but he thought they would cut the hay and bale it. And I asked him what he would take for the hay——

Mr. Wrightsman: Objected to as incompetent, and irrelevant. This is not a conversation with Mr. Wagg.

The Court: Well, Wagg told him to go to Drown.

A. I asked him what he would take for the hay, and he said he would take a dollar and a half a ton, he wanted a dollar and a half a ton for the hay on the ground. 307

Mr. Clark:

Q. Was that before it was cut, or afterwards?

A. That was just for the grass on the ground.

Q. Now, about what per ton—per acre would that hay go, that grass?

Mr. Biddison: We object to that; the competency of the witness is not shown.

Mr. Clark:

Q. I will ask you if you had examined the hay with the contemplation of pu-chasing it?

A. No, sir, I never had examined the hay, any more than going out to Mrs. Herbert's and back, when I went out to see her about it.

Q. Well, you saw the hay?

A. I saw the hay out along the road, between Mrs. Herbert's and town.

Q. Now, then, did you consider it enough to estimate its value as to what it was worth per acre, and what it was worth per ton, and what it would go per acre; did you consider those matters at the time you were contemplating the purchase of it?

Mr. Wrightsman: We object. The witness says he did not examine the hay, except along the road; competency not shown.

Mr. Clark:

Q. How much would it make per acre?

Mr. Wrightsman: Objected to.

Mr. Clark:

Q. Do you know how much it would make per acre?

A. Yes, sir, in my judgment.

Mr. Wrightsman: Wait a minute. Objected to, for the reason that the competency of the witness is not shown.

Mr. Clark: That is just this question.

Mr. Wrightsman: He may make *the* swear, but that don't satisfy the court, I don't think. His competency has got to be shown.

308 The Court: Answer the question.

Mr. Wrightsman: Exception.

Mr. Clark:

Q. How much would it go per acre?

Mr. Biddison: Objected to, for the reasons before stated.

The Court: Objection overruled. That has been ruled on about three times now.

Mr. Clark:

Q. What do you say.
A. Well, I suppose it would have went anyway a ton to the acre, and maybe a little better. I was willing to pay for that anyway. I believe that is what I offered Mrs. Herbert.

Mr. Clark: That is all. Take the witness.

Cross-examination by Mr. Biddison:

Q. What you knew about that hay was what you had seen in walking over to Mrs. Herbert's?
A. Yes, sir.
Q. Never made any examination of it?
A. I never went over the hay; never went over the place.

Mr. Biddison: That's all.

John H. Crismon, being produced and sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Judge Dale:

Q. State your name to the court.
A. J. H. Crismon.
Q. Where do you live, Mr. Crismon?
A. Live seven miles northwest of Pawnee.
Q. Have you ever held any official position in this county?
A. Yes, sir.
Q. What was it?
A. Sheriff of the county.
309 Q. For how long?
A. Two years.
Q. Have you familiarized yourself with the different portions of Pawnee County?
A. How is that?
Q. Are you familiar with the different parts of Pawnee County, the towns, and locations of towns, etc.?
A. Yes, sir.
Q. Were you familiar with the locations of the towns in the summer of 1901?
A. Yes, sir.
Q. Do you know where Cleveland is located?
A. Yes, sir.
Q. Do you know the location of this eighty-acre tract in controversy in this case?
A. Yes, sir.
Q. Do you know how it lies to the town of Cleveland?
A. I do.
Q. The character of the land?
A. Yes, sir.

Q. Are you familiar with the values of lands in Pawnee County

A. Well, I am to one section of the country; farm lands.

Q. Were you familiar with the values of farm lands about Pawne County, generally, during the year 1901? Were you sheriff at tha time?

A. Yes, sir.

Q. Were you—Do you know what lands sold for throughout th different parts of the county, what they were held at?

A. Farm lands, yes, sir.

Q. Now, do you know what lands were being offered for sale at and held at, and sold at, around about Cleveland at tha time?

310 A. No, sir, I do not.

Q. Do you know what farm lands were held at about th town of Cleveland, or in that vicinity, that section of the count in the year, 1901?

A. No, sir, I don't know that I do. I never paid any attentio to that. I know what farms were selling for generally over th country, different classes of land.

Q. And did you know what town properties were worth, aroun different parts of the county, about that time; what they wer selling at?

A. No, sir, not outside of Pawnee.

Q. Did you know about how much of a place Cleveland was a that time, in 1901?

A. I was in it quite a number of times, but I never paid an attention to what they claimed as the population of it.

Q. Well, you could form your own judgment as to the populatio could you not, Mr. Crismon, without inquiring of anybody abou that?

A. Yes sir.

Q. You say you were familiar with this eighty-acre tract of lan do you know how it lies to the town of Cleveland?

A. Yes, sir.

Q. I will ask you whether or not, in your judgment, it was d sirable for addition purposes to the town of Cleveland?

A. Why, yes, sir, I would think it would be fine residen property.

Q. I will ask you if, from your knowledge of the values of lan in Pawnee County, and your knowledge of the town of Clevelan its prospects, and the location of this particular eighty-acre tra of land, you have an opinion at this time as to the reasonable ma ket value of the eighty-acre tract of land for any purpose for whic it might be used?

311 Mr. Biddison: Objected to as irrelevant and immateri

Judge Dale:

Q. In the summer of 1901?

Mr. Biddison: Same objection.
The Court: Objection overruled.
Mr. Biddison: Exception.

Judge DALE:

Q. Have you an opinion upon that matter?
A. Yes, sir.
Q. Taking into consideration its location to the town of Cleveland what, in your judgment, was the reasonable market value per acre of that eighty-acre tract of land in the summer of 1901?
A. Well, I would think a hundred dollars an acre would be the reasonable market value of it.

Judge DALE: Cross examine.

Cross-examination by Mr. BIDDISON:

Q. You reside where, Mr. Crismon?
A. Seven miles northwest of Pawnee.
Q. Cleveland is about twenty-five miles southeast, in the opposite direction?
A. Yes, sir.
Q. You live something over thirty miles from Cleveland?
A. Yes, sir.
Q. Did you know of any demand for real estate in the spring of 1901, for townsite purposes, or additions to the town of Cleveland?
A. I never paid any attention to the valuation of Cleveland town property. I don't know what town property was selling for.
Q. You know at that time there was a great deal of vacant property in the town of Cleveland?
A. You mean houses, or just vacant land?
Q. Vacant land.
A. Yes, sir, there was plenty of land contiguous to Cleveland, and around it.
312 Q. Well, there was plenty of vacant land in the townsite of Cleveland and in the spring of 1901, wasn't there?
A. Yes, sir.
Q. Do you know whether or not at that time a very large part of the lots of Cleveland were selling for taxes?

Judge DALE: Objected to as incompetent, and not the best evidence.
The COURT: Objection sustained.

Mr. BIDDISON:

Q. Do you know whether or not there was any demand for town property at Cleveland in that spring?
A. No, sir, I don't know what the demand was.
Q. You don't know whether there was any property selling in that vicinity?
A. Not that I know of.
Q. You were not very well acquainted there, were you, John?
A. Pretty well acquainted with Cleveland, and have been since the opening.
Q. How frequently were you down there in the spring of 1901?

A. Oh, I don't think I was there over a half a dozen times a year.

Q. When you were there, you were most on official business?

A. On business, yes, sir.

Q. Did you know of any lands selling for townsites, or for additions to townsites, in Pawnee County, about that time, in the spring of 1901?

A. No, sir. I don't think I paid any attention to it. Can't recollect now of any.

Q. What did you base your knowledge of the values on, or your judgment, rather, of the values of this land in the spring of 1901?

313 A. Well, I will tell you what I base my opinion on. Cleveland has always been considered a good little town, and enjoyed a good trade, and that is what I base my opinion on, and this land joining right up to the townsite. It is a guess proposition with me, of course, because I don't know what town property was selling for in Cleveland at that time.

Q. It is a guess proposition with you?

A. Yes, sir.

Mr. BIDDISON: That's all.

A. Just my opinion.

Redirect examination by Judge DALE:

Q. Just your opinion?

A. Yes, sir.

Judge DALE: That is all anyone can give. That's all. You gentlemen say you want to cross-examine Mrs. Herbert?

Mr. BIDDISON: Yes, sir.

Mrs. MARY B. HERBERT, being recalled for further cross-examination, testifies as follows.

Recross-examination by Mr. WRIGHTSMAN:

Q. Mrs. Herbert, you recall the fact of being a witness at the previous term of this court, concerning this same case, do you?

A. Yes, sir

Q. With reference to the month of May, in the year 1901, I will ask you if this question was not put to you: "Q. Mrs. Herbert, had you not consulted attorneys during that time, and at that *that* time, with reference to the effect of that deed? Answer: Consulted attorneys in May". Did you or not so testify?

314 Judge DALE: Objected to as immaterial, and not contradicting any of the testimony given.

Mr. WRIGHTSMAN: We submit it is material, and in direct contradiction to her testimony of last night, to the effect that she had not consulted attorneys until she consulted her counsel, Mr. Clark, the year that the suit was brought, which was in 1903, of and concerning these transactions.

The Court: That does not indicate what year.

Mr. Wrightsman: I stated, Your Honor, as a predicate to my estion, "referring to May, 1901."

Judge Dale: That is not all. It does not show that she consulted m about the effect of the deed.

The Court: Does the question and answer there disclose that it s 1901?

Mr. Wrightsman: No, sir, except by inference. I stated first, th reference to May, 1901.

Mr. Clark: Counsel may draw the wrong inference.

Mr. Wrightsman: I will just go back a little.

Mr. Wrightsman:

Q. (Reading from manuscript) "Question: Do you recall anying further in the conversation with him the following morning at you have not narrated? Answer: The extent of the conversaon that following morning, as I recall it, was that I asked him out the indemnity" (I presume she means "redemption") "that understood there was an indemnity law, and that my understandg was that the deed was not given to convey title, and didn't underand what he meant by having the deed recorded, I wanted to have fuller understanding of what he meant to do, and his reply to e was, 'Whoever tells you that a deed does not convey title is no iend of yours'; and that he had been asked in Pawnee what he intended to do with his land down at Cleveland. That is the extent of the conversation. Question: That was the extent of the conversation? Answer: As I recall it, I think at is almost word for word."

Judge Dale: Who is that with,—Mr. Wagg?

Mr. Wrightsman: Yes, sir, I want to give what is just before that, o. "Question: Now, did you make any inquiry of him at that me as to whether he had taken legal advise on the question? Anver: No, sir, I did not. Question: Had you taken legal advise on e question? Answer: No, sir, I had not. Question: Mrs. Herert, had you not consulted attorneys during that time and at that me with reference to the effect of that deed? Answer: Consulted ttorneys in May." Now, I think that is clear as to the time.

Judge Dale: I don't think *think* it is.

The Court: I don't either. It may have been the May of any ear inquired about.

A. That referred to this May——

Judge Dale: Never mind, Mrs. Herbert.

The Court: Objection sustained.

Mr. Wrightsman: Exception.

Mr. Wrightsman:

Q. I will ask you if this question was put to you in your former rial by Mr. Conley: Question: How much did you offer to sell to loan for? Answer: I think it was fourteen hundred dollars: uestion: For the fifty-five acres. What kind of a title did you ffer to give Mr. Sloan, if you made that sale? Answer: Mr. Sloan did not speak to me of Mrs. Herbert's signature at all. Question: He did not? Answer: No, sir."—I will ask you, was this question put to you: "You intended to give a clear title, didn't you? Answer: That was the question. I was under the impression at that time, as it was a homestead, I didn't have to have his signature."

316 Judge DALE: Well, are you through?

Mr. WRIGHTSMAN: Yes, sir.

Judge DALE: I object to the question as immaterial and irrelevant, and not tending to contradict any of the testimony the witness has heretofore given.

Mr. WRIGHTSMAN: Upon this proposition: That it was her impression that her husband didn't need to sign this, as it was her homestead. That, in other words, she was conveying everything; that there was no reservation; that there was no cloud to the title; that she was selling in fee simple that estate.

The COURT: Well, it is open to two constructions, the one you suggest, and the other, which is reasonable, her answer there that she did not have to have his signature with the man she sold to, that he did not require it.

Mr. WRIGHTSMAN: That is not the inference here.

The COURT: Where it is susceptible of two inferences, the witness is entitled to that which would not contradict her. If it is as readily susceptible of two interpretations, she is entitled to the interpretation which is favorable to her, and not unfavorable.

Mr. WRIGHTSMAN: I think the interpretation which I gave it the most reasonable one. There is only one reasonable interpretation, to my mind, following that closely. "I was under the impression at that time as it was a homestead I didn't have to have his signature." Not that it was required, but it was her impression as it was a homestead she didn't have to have his signature.

317 Judge DALE: I don't think that tends to contradict any testimony she gave yesterday. She don't know, and says she don't.

The COURT: She may answer the question.

Judge DALE: I would like to have the question put in such shape so that she can understand it.

The COURT: Let him read the question there.

Mr. WRIGHTSMAN:

Q. Did you so testify?

The COURT: Read the question to her.

Mr. WRIGHTSMAN:

Q. "Question: You intended to give a clear title, didn't you." Was that question put to you?

A. I do not recall.

Q. To that question did you answer——

A. I do not recall.

Q. Just wait until I get the question. "That was the question; I was under the impression at that time as it was a homestead I didn't have to have his signature". Did you so answer?

Judge Dale: Objected to as incompetent, irrelevant and immaial, and because not tending, in any manner, to contradict any timony of the witness given upon the trial of this case.

The Court: Objection overruled.

Mr. Wrightsman:

Q. What is your answer?

A. I do not recall. Last term of the court was the first time——

Q. I am not asking you anything about that.

A. Well, I have answered that I do not recall the question.

Q. You do not recall that question. Do you recall giving the swer?

A. I do not recall, no.

Q. What is that?

A. I do not recall in regard to it.

8 Q. You do not recall in regard to it?

A. No.

Q. Is that answer true?

Judge Dale: Oh, I object to that, as incompetent, irrelevant and material.

Mr. Wrightsman: It is cross-examination.

Judge Dale: It is not a proper method of cross-examination.

The Court: Objection sustained.

Mr. Wrightsman: Exception.

Mr. Wrightsman:

Q. Is it not a fact that at the time just referred to, it was your imession that as the land was claimed by you as your homestead, that u did not have to have the signature of Mr. Herbert to convey title?

Judge Dale: Objected to as immaterial to any issue in this case.

The Court: Overruled.

Judge Dale: And irrelevant.

The Court: Answer the question.

Judge Dale: Note an exception.

A. I do not recall any such impression, except as coming from the rown family, some way of that kind. Their statements were always conflicting, and on all these business matters I was entirely inexrienced——

Mr. Wrightsman: Just wait a minute.

The Court: Answer the questions asked. You consume so much me.

Mr. Wrightsman:

Q. Read the question.

Thereupon the question was read by the stenographer.

A. I do not recall it as an impression. My recollection is 19 that it was simply suggested, whether we could, from some source; I don't know why; that probably as it was a homeead, his signature might not be required.

Q. Well, that made up in your mind, then, in your judgment——

A. I learned that it was afterwards——

Judge **Dale**: Wait a moment. Wait until he gets the question out.

Mr. **Wrightsman**:

Q. At that time, that in order to convey this title, you didn't have to have his signature, is that so?

Judge **Dale**: Objected to as incompetent, improper cross-examination, irrelevant and not material to any issue in this case.

The **Court**: Overruled. Answer the question, please.

Judge **Dale**: Note an exception.

A. As to whether I——

The **Court**: Read the question to her.

Thereupon the question was read by the stenographer.

A. I don't think that is so.

Mr. **Wrightsman**:

Q. You don't think that is so?

A. I do not recall it that way; I do not recall it that way.

Q. What is that?

A. I do not recall that impression that way, or suggestion that way.

Q. At this time——

A. If I could explain——

Q. You have no recollection of having such an impression at the former trial of this case, is that it?

Judge **Dale**: Objected to as immaterial and incompetent.

The **Court**: Objection sustained.

Mr. **Wrightsman**: That's all.

Judge **Dale**: That is all, Mrs. Herbert.

320 The **Court**: Call your next witness, gentlemen:

Judge **Dale**: I don't know whether the answer denies the execution of the deed, etc. If not, it is not necessary to offer in evidence any testimony showing the execution.

The **Court**: I don't think they deny under oath but one proposition, and that is the agency of Drown. That is my recollection of it.

Mr. **Biddison**: The execution of all the written instruments is expressly acknowledge-, except the propositions that we deny that the endorsements upon exhibit "C" were on there at the time of its execution or delivery.

The **Court**: What endorsement is that?

Mr. **Biddison**: The endorsements placed on there by the bank. That "this is left in escrow as security for a certain loan. And that at the bottom, that it is left as additional security, etc. We simply deny that that is a part of the instrument. It don't appear on its face to be a part, but simply an endorsement. It is not within the signature, and not within the deed, and we deny that it is part of the instrument.

The **Court**: If it was never authorized by the parties, it simply determined the purpose for which it was to be held; it would be that vhich would govern the depository, as to what he should do with the nstrument.

Mr. Biddison: Here is our denial as to that.

Thereupon Mr. Biddison read the same.

The Court: Do you deny they were put on there with the consent of the parties at the time they were deposited?

Mr. Biddison: We do not deny that they were put on there by Mr. Litten. But Mr. Wagg was not there, and knew nothing about the transaction at all.

321 Judge Dale: Was Mr. Litten authorized to do this. That is the question.

The Court: This is a memorandum as to how he was to hold it. The question is whether whoever deposited it there gave him the instructions by which he made the memorandum.

Mr. Wrightsman: He becomes a material witness upon that point.

The Court: Of course if you gave him the directions, it would be just as material.

Mr. Wrightsman: Of course, but that cannot be implied.

Judge Dale: Well, I think I will rest, upon the fair implications of the letters of Mr. Wagg, that it was authorized to be placed there, without any proof, so far as that is concerned, because that was the nature of his writings. Now, we don't know just how to make the ender, but we——take this, Mr. Stenographer——we make a tender at this time, in open court, of all monies due upon this mortgage executed by Mrs. Herbert, the plaintiff, and her husband, together with all taxes which have been paid by the defendant, Mr. Wagg, and any other proper expenses which he has been put to with reference to this mortgage and demand, and tender that for his benefit in open court, and ask that the same be made a part of the judgment and accounting which we ask the court to grant on behalf of the plaintiff. And that he be given credit for such sum as may be due to him under the mortgage, in such accounting.

The Court: Have you got your jar with you?

Judge Dale: Yes, and we will get the lid off, if it is necessary.

322 Mr. Biddison: Do you make the tender to the other defendants?

Judge Dale: There are no other defendants in this case.

Mr. Biddison: No other defendants besides Mr. Wagg?

Judge Dale: Not in the main case, the case we are trying at this time. Now, I would like to ask the other parties to accept or reject the tender, in open court, and counsel for plaintiff calls upon counsel for defendant Wagg to accept or reject such tender in open court, and accede to an accounting and ask the court to direct them to announce what they will do. What do you say, gentlemen, fish or cut bait.

Mr. Biddison: We are trying a lawsuit?

Judge Dale: Are you.

Mr. Biddison: Yes.

Judge Dale: What does the court say?

The COURT: I don't think the court should require them to say whether they accept it or not. If your tender is made, it serves the purpose; and if not, it does not serve any.

Judge DALE: Well, will counsel for the defendant waive the bringing in of the money into open court? I can go and get the money in five minutes, or three minutes, or as soon as I can get to the bank and bring it in here. And I say to the court, in good faith, I am willing to do it, if they will evidence a disposition to accept it, and account for what they have received.

The COURT: What do you say, gentlemen? Do you desire to have the money placed in the hands of the court?

Mr. BIDDISON: We stand entirely on our pleadings in the case.

323 The COURT: The court is asking you a question. Do you desire to have the money deposited, or do you waive the formal tender of the money?

Mr. BIDDISON: We are not making any demands or acknowledging any sufficient tender.

Judge DALE: Well, I will go over and get the money, if you will give me a recess of ten minutes.

Mr. WRIGHTSMAN: Except the defendants Drown and Wagg, each and all of them claim to be innocent purchasers, for value, without notice. [illegible].

The COURT: The Court is only trying this as to one——

Mr. WRIGHTSMAN: He asked as to all, Your Honor.

Judge DALE: Oh, no. I only asked as to Mr. Wagg. We would like a recess, if the court please, of about ten minutes. I supposed they would waive.

The COURT: Well, I don't care to take up the time. I don't really think it is necessary, under the law; that is my judgment about it. I would not want to make that statement. As an offer to tender, which is made good when required by the court, is my understanding of the rule.

Judge DALE: I think that is perhaps true, if the court please.

Mr. BIDDISON: I think the rule is that the tender in the pleadings is sufficient, if it is made good when required in the course of the trial.

The COURT: I think that is the rule.

Judge DALE: I take it that is the better rule. I did not know whether——These parties, in as much as they make that statement in the record, if that is true, we will just rest.

The COURT: You rest on your evidence?

Judge DALE: Yes, sir.

324 Mr. WRIGHTSMAN: Before that is concluded, Your Honor, we have sent for the witness Litten, as a part of the further cross-examination we desire to lay the foundation for his impeachment, in the matter of his testimony yesterday, as to values, in this, that he testified in the former trial——

Judge DALE: I will admit Mr. Litten testified upon the former trial, that the land, for farming purposes, was worth fifty dollars an acre.

Mr. **Biddison**: The testimony is that it was worth forty to fifty dollars an acre for all purposes.

Judge **Dale**: My understanding is that that testimony was given under the ruling of the court that no testimony could be given, except for farming purposes.

Mr. **Biddison**: If you will waive his being here, we can have the testimony read.

The **Court**: Well, the witness is not here. We are fighting a straw man.

Mr. **Biddison**: We want permission to recall that witness, is all, for impeaching purposes.

The **Court**: You may have permission, when the time comes, if proper. Proceed with the case.

325 R. H. **Hudson**, being sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. **Wrightsman**:

Q. State your name.

A. R. H. Hudson.

Q. Were you the official stenographer of this court at the former trial of this case?

A. I was.

Q. As such stenographer, did you reduce to shorthand the testimony of Mrs. Herbert, given upon the trial?

A. I did.

Q. Was that testimony given by her as a witness in said case?

A. I- was.

Q. I will ask you if, in that testimony, the following question was propounded by Mr. Conley: "Question: You intended to give a clear title, didn't you?"

A. It was.

Q. And to that question, I will ask you if the following answer was given: "Answer: That was the question. I was under the impression at that time, as it was a homestead I didn't have to have his signature?"

A. Yes, that was her answer.

Mr. **Wrightsman**: Cross-examine.

Judge **Dale**: Wait a moment. I want to object to that, as being incompetent, irrelevant, and immaterial. I didn't suppose you were through with your question. And not proper matter, because the same does not, in any manner, tend to impeach, or modify, or contradict the testimony of the witness in the trial of this case.

326 Mr. **Wrightsman**: We called her attention to it. She testified as to giving her signature, and not giving full scope and effect to the conveyance.

Judge **Dale**: I don't know what the purpose of that can be.

Mr. **Wrightsman**: It is very important for our theory. It may not be very important as to your theory.

Mr. **Clark**: This refers to the deed to Wagg, and that refers to the deed to Swan, if I remember.

Mr. **Wrightsman**: No, this is the Sloan matter.
The **Court**: Well, objection overruled.
Judge **Dale**: Note an exception.

J. W. **Ortner**, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. **Biddison**:

Q. State your name.
A. J. W. Ortner.
Q. Where do you reside?
A. Cleveland.
Q. What official position, if any, do you occupy there?
A. Mayor.
Q. Are you acquainted——

The **Court**:

Q. Mayor of Cleveland?
A. Yes, sir.
Q. That is a new office in a town, isn't it?

Mr. **Biddison**:

Q. I will ask you if you are acquainted with what is known as the Wagg addition to that town?
A. Yes, sir.
327 Q. How long have you know- it?
A. Well, I have known it ever since it has been there, I reckon. I was there at the time the country was first opened.
Q. You have lived there ever since?
A. Yes, sir.
Q. During that time, what has been your business?
A. Well, I have been in different businesses, mills, cotton gin, butcher shops, and various things.
Q. During that time have you been acquainted with the market value of real estate in and about Cleveland?
A. Yes, sir, some, I think.
Q. Are you acquainted with the market value of this fifty-five acres contained in the Wagg Addition, in the spring of 1901?
A. I don't know that I can say that I am, any more than the balance of the land around there.
Q. Well, from that, have you an opinion as to the value of that land at that time?
A. Yes, sir.
Q. You may state what that land, in your judgment, was reasonably worth in the spring of 1901?
A. Well, I don't know as the particular piece, but the land joining the town there was from fifteen to twenty-five dollars, ranging, in my best judgment.

Mr. **Biddison**: You may cross-examine.

Cross-examination by Judge **Dale**:

Q. Mr. Ortner, you put the values of this land at the same price as you say lands were selling for about Cleveland?

A. Yes, sir.

Q. At that time. Now, I will ask you if any other land about the town of Cleveland sold about that time?

328 A. Well, something near. I am speaking from the time of the opening, up until the time we was assured a railroad in there. I don't remember the dates just exactly, but up to that time.

Q. Well, was there any other land around there so favorably situated for addition purposes as Mr. Wagg's land?

A. Well, there was an eighty on the east, the Sloan Addition, that I consider fully as valuable for town purposes, or even agricultural purposes, as that.

Q. Was it smooth and level?

A. Yes, sir. Well, not altogether. They lay something similar. The east side is probably a little bit higher; maybe a little more rolling, while it has not so many draws in it, I believe.

Q. How many draws are there in the Sloan Addition?

A. Well, there is one draw on the north end; that is rough; and I believe there is two in the Herbert Addition.

Q. Well, does the town build west or east? the residence portion.

A. The best residence portion is on the east.

Q. What part of the east?

A. The Sloan addition and out in there. It is built up with very nice houses; very nice location.

Q. How many houses are there on the Sloan Addition?

A. I couldn't tell you. A number of them, though.

Q. The Wagg land was platted in the summer of 1901, was it not?.

A. I don't remember the date, but it was platted somewhere along there.

Q. The town is building out in that direction?

A. It is building on both sides, yes.

Q. Well, where was the business of the town, the old town of Cleveland, what street?

A. Well, the business is nearer—there is one block, I believe between that and the Herbert Addition; and I believe it is two and a half——

329 Q. That is the business street, was it?

A. Yes, sir.

Q. Now, this Wagg Addition, did that lie a little bit up, or a little bit lower than the old town of Cleveland?

A. Well, some of it is about on a level with it, and some of it is lower. The northwest is a good deal lower, and the southeast and the northeast.

Q. Now, there is a sort of strip of land running through the Herbert eighty from the southwest to the northwest which is kind of well up, is it not?

A. The draw, you mean?

Q. No, I mean the center of that eighty.

A. The center of the eighty?

Q. Yes, sir, lays up in that shape.

(Indicating with his hands.)

A. Yes, sir; a very nice location.

Q. And it is very close to where the business part of the town is?

A. Yes, sir, it runs out from the business town of Cleveland, that divide, I would call it, and the two draws lay up against it.

Q. Do you know the time the Wagg Addition was laid out?

A. Yes, sir.

Q. From that time there had been a steady growth of buildings on that Herbert eighty?

A. No, sir, it was not for quite a while; we had no growth of business there, much, until the railroad——

Q. How many houses were constructed on that Wagg Addition in 1901?

A. Well, I couldn't tell you.

330 Q. Several, were there not?

A. Several little houses.

Q. Now, Mr. Ortner, you know, do you not, that the reason the Wagg properties there did not sell very well, was because there was some question in the minds of some people there about the title to this property?

A. Well, it had been talked quite a while.

Q. A good deal of that talk going round, wasn't there?

A. Yes, sir, but I don't remember how far it dated back; I can't say how far that talk dated back, I paid very little attention to it.

Q. You don't pretend to say to this court, and you don't want to be understood, that that land, which was suitable for addition purposes, to that town, was only worth twenty-five dollars an acre?

A. Well, I am only going by what land was selling right there at town.

Q. Land that was suitable for platting, and would appeal to a business man's judgment that it was suitable, you would not say that land was not worth but twenty-five dollars an acre, would you?

A. I am basing my judgment on the land that sold on the east side. That is what I am basing my judgment on.

Q. The Sloan eighty sold some time previous to the time this was platted, did it not?

A. I know it was sold before it was platted, but it was joining the townsite, and that is what I had to guide me at that time.

Q. It was further from the business part of the town?

A. Yes, sir, two and a half blocks, I think, from the business part.

331 Q. Do you think that Sloan eighty, as a whole, is as suitable as the Wagg eighty?

A. Yes, sir, more so.

Q. Why?

A. It is higher and nicer. There was beautiful building places on both eighties, so far as that is concerned.

Q. You think the Sloan eighty was not worth over twenty-five dollars an acre?

A. It didn't sell for over that.

Q. Do you think it was not worth more than that?

A. That is what I am basing my judgment on, what it sold for at that time.

Q. Supposing a person was not desirous of selling, that is, say they could hold the land, now, under those circumstances, do you say the land was not worth but twenty-five dollars an acre, if it was suitable for platting purposes?

Mr. **Wrightsman**: Objected to, as depriving the witness of a reasonable basis.

The **Court**: Well, what land sells for does not determine its reasonable value, unless the sale is made under conditions that fixes its value. A man might be in a cramped condition and have to sell, and he might sell for a lower price, and there might be no buyers. The law fixes the salable price of land at what it would bring if offered in the market by a person desiring to sell to a person desiring to buy, both desirous, the one to sell, and the purchaser to buy. It is not a forced sale, or auction sale, or something of that kind.

Mr. **Wrightsman**: No, sir, but that would not be presumed, unless it appeared from the evidence, and there is no evidence here that there was a forced sale.

The **Court**: There is no evidence on that subject. The
332 question was submitted to the witness, whether or not his
ideas would be the same as to value, if the conditions were
as the law fixes it. There is nothing improper in the question.

Mr. **Wrightsman**: Exception:

Judge **Dale**:

Q. Mr. Ortner, that land was worth twenty-five dollars an acre for farming purposes, wasn't it?

A. Well, it may have been. While I say I know of nothing—I know of bottom land selling that would be fine agricultural land; I know of no land selling for more money.

Q. You would think it was worth twenty-five dollars an acre for farming purposes, reasonably worth that?

A. Well, land was selling for that there.

Q. For farming purposes?

A. Yes, sir. Some of it was bottom land; but I know of nothing that brought more money than that, at that time.

Q. Those sales, for the most part, were not joining Cleveland, were they?

A. There was one eighty that cornered with the southeast corner of the townsite. It lay on Cedar Creek——

Q. No, that was not good for anything but farming?

A. That was farming land.

Q. Purely and strictly?

A. My understanding is that that sold for fifteen dollars an acr—No, twenty-two dollars; something like that.

Q. How long before this time was it?

A. It was something near that time; I couldn't say; but it wa some time before we were assured of any railroad there, and the lan was about the same.

Q. Who owned that land?

A. The Bert Orr estate.

333 Q. Can't you fix about the time of that sale?

A. Well, I think it was the summer of '91; 1900, or 1901 I wouldn't be positive.

Q. Who bought it?

A. Mr. Powell.

Q. I understand that you are basing your value wholly as a farming proposition?

A. Well, choice land was selling for just what they wanted to us it for. The eighty on the east there, at that time, when it was sold I didn't know whether they was buying it for farming purposes o town purposes. I supposed it was for farming purposes, becaus there was no demand for town purposes at that time.

Q. You think it was worth that for farming purposes?

A. Yes, sir, it ought to be worth that.

Judge Dale: That's all.

Redirect examination by Mr. Biddison:

Q. Mr. Ortner, what size town was Cleveland at that time?

A. I should judge somewhere near four hundred.

Q. Was there much or little vacant property in town?

A. Well, there was a good deal of vacant property.

The Court: You mean unimproved lots, Mr. Biddison?

Mr. Biddison:

Q. Well, was there much unimproved property there at that time

A. Yes, sir, quite a bit.

Q. Was there any demand for it?

A. Very little.

Q. In the Spring of 1901, what prospect, if any, was there of railroad there?

A. Well, we didn't have very much prospect at that time, i my recollection.

334 Q. There was no railroad surveyed through there at tha time?

A. Not that I know of.

Q. What lines of railroad are there there now?

A. The M. K. & T. is there now, from Kansas City through t Oklahoma City.

Q. How far are you from the line of the Frisco from Tulsa t the west?

A. We are about—I believe we consider it about forty-five mile when we had to travel it over the hills.

Q. I mean, how far from the line of railroad, the Frisco, that runs from Tulsa up to the county seat here?

A. Oh, about ten miles; nine or ten miles.

Q. It crosses the Katy railroad that runs through your town?

A. Yes, sir.

Q. I will ask you, at the time of the location and survey of these railroads, what effect, if any, it had upon the town property in your town?

A. Well, it had a good deal. Property advanced considerable, and changed hands, a great deal of it.

Q. What effect did it have on prices?

A. Well, the prices, my recollection is, doubled and trebled, and I don't know how much more.

Mr. **Wrightsman**:

Q. Doubled and trebled, and you don't know how much more?

A. No, sir.

Mr. **Biddison**:

Q. In this Sloan Addition, that you speak of, was that a forced sale, or a judicial sale, or anything of that kind, that you know of?

A. Not that I know of.

Judge **Dale**: I object to that. The witness does not know the conditions under which the sale was made.

335 The **Court**: The question was ask- him if he knew, and he said he did not. There is that much time consumed. Now go ahead.

Mr. **Biddison**:

Q. The land was sold by the Jordan Valley Town Company, was it not?

A. Yes, sir.

Q. That owned the town of Cleveland?

A. Yes, sir.

Q. Do you recollect what it sold for?

A. Somewhere about eighteen hundred——

Judge **Dale**: Objected to. No foundation has been laid for that. He has not said that he was present when the sale was made, or knows anything about it, except hearsay.

The **Court**: I don't know what the purpose of it is. If it is for the purpose of fixing the sale, for the purpose of making comparison for the court, it is—it does not appear that he knows of it. If it is simply a matter of information to him, upon which he was basing his judgment, it is not necessary, because he has already testified, and been permitted to give his judgment.

Mr. **Biddison**:

Q. You knew of other lands selling in and about that vicinity near that time?

A. Yes, sir.

Q. And adjoining the townsite?

A. Yes, sir. On the northeast, the Lee Jordan farm, now owned by Loterette was sold, probably a little earlier than this other sale, but somewhere along there; a year, or such a matter, of the time.

Q. What distance is it from Cleveland to the county seat of the county?

A. About twenty-four miles, I think, or twenty-five.

336 Q. What was the character of the route between the two places, as to being easy to get from one place to the other?

A. Not very easy, no, sir.

Q. What was the land adjoining the Wagg Addition, in the original townsite; was that settled up with dwellings at that time?

A. It was not all settled; some of it; there were a good many vacant lots.

Q. Where has been the main demand for residence property in that town of Cleveland?

A. Well, the Sloan Addition has been—they have been looking to that as a very desirable place; in fact, it has been building up; well, they have built on both very nice residences, and on the Herbert.

Q. Prior to the time this was laid out, up to the time the Wagg Addition was laid out, was the demand for residence property on the east or west side of the town?

A. No, sir, we had room enough on the original townsite at that time.

Q. I mean within the townsite; was the demand for residence property in the townsite, on the east side or on the west side of the business part?

A. Well, it was on the east side.

Recross-examination by Judge Dale:

Q. Wasn't any room on the west of the business part to build, was there?

A. Not much.

Q. The business part butted up against the Wagg addition?

A. Yes, sir.

337 Q. They had to go east, unless they went over on the Wagg Addition; that is true, is it not?

A. How is that?

Q. I say the residences in the old townsite had to go east of the business part, in order to find any place?

A. Well, there was some room next to the line; but this townsite butted up against the Herbert. There is vacant lots there today.

Q. There wasn't any street there before the Wagg Addition was laid out, was there? The old town company didn't leave any street next to the Wagg Addition, except a few feet?

A. My understand- was at that time there was a street there.

Q. There was just an alleyway, wasn't there? Do you say the old town company left a wide, commodious street there?

A. We always had a street up there; I don't know the width of it.

The Court: I think Mrs. Herbert testified they left half a street; that is my recollection.

Mr. **Clark**: Left a few feet, but I don't think that much.

Mr. **Wrightsman**: Will counsel agree there was enough to walk n?

Judge **Dale**: There was about that much, about all.

Judge **Dale**:

Q. Mr. Ortner, were you one of the parties who undertook to ocate this Herbert Addition for townsite purposes in 1894?

A. No, sir. I never have owned a lot on the Herbert Addition; was not in that run at all.

Q. Mr. Ortner, you have lots on the Wagg Addition now?

A. No sir. I never have owned a lot on the Wagg Addition. I have a few lots on the Sloan Addition is all—I mean, the Swan Addition, off of the Herbert Addition. I have none on the Wagg.

338 Q. Never was interest- in any property there?

A. No, sir, I never have been.

Judge **Dale**: That is all.

Redirect-examination by Mr. **Biddison**:

Q. The Swan Addition is a part of the twenty-five acre tract that Mrs. Herbert sold to Swan?

A. Yes, sir.

Q. How far was the town of Cleveland from the nearest railroad n the spring of 1901?

The **Court**: Oh, we have gone over that sufficiently, Mr. Biddison. It has been testified to by two or three witnesses.

Mr. **Biddison**: I don't recollect that it has been testified to by any witness.

The **Court**: I do. It has been testified to two or three times.

Judge **Dale**: The Court takes judicial knowledge of the location of the towns, any way.

Mr. **Biddison**: That is all.

The **Court**: It is not important, any way.

G. W. **Sutton**, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. **Biddison**:

Q. You may state your name.

A. G. W. Sutton.

Q. Where do you reside?

A. Cleveland.

339 Q. How long have you resided in Cleveland?

A. Since '93; 1893.

Q. In what portion of the town do you reside?

A. The old portion; the original townsite.

Q. In what business are you engaged?

A. Well, I practice medicine, and do a little other outside business.

The **Court**: Talk a little louder, please.

Mr. Biddison:

Q. What other business?

A. Well, I am in the banking business there.

Q. Besides the practice of medicine?

A. Yes.

Q. What official position, if any, do you hold in the territory?

A. I am one of the Regents of the University.

Q. How long have you resided in Oklahoma?

A. Well, I was there the next day after the opening, in 1893.

Q. During your residence there, have you formed an acquaintance with the values of real estate in that community?

A. Well, somewhat.

Q. Do you know the values of real estate in that community, in the spring of 1901?

A. You mean what they were selling for, or what they were valued at?

Q. What the fair market value was in the spring of 1901?

A. There was very little land selling at that time.

Q. Well, but what it was worth on the market, by people who wanted to sell, to purchasers who wanted to buy?

A. Well, I suppose it would range from fifteen dollars, probably to thirty dollars an acre, or twenty-five dollars an acre.

340 Q. Were you acquainted with the Herbert tract of land at that time.

A. Yes, sir.

Q. Were you acquainted with that portion of it that became afterwards the Wagg Addition?

A. Well, I knew the north portion of the eighty I didn't know just where the lines were; it was the north portion.

Q. You know about what is the Wagg Addition there?

A. Yes, the north portion of the eighty.

Q. I will ask you if you have a judgment, or opinion, as to the value of that fifty-five acres of land in the spring of 1901?

A. Well, I could only form a value, upon what land adjoining was selling for. That is the only way that I could get at the real value of it.

Q. Do you know what that land was worth at that time?

Judge Dale: The reasonable market value.

Mr. Biddison:

Q. The reasonable market value, considering supply and demand, and the purposes of the town, and the purposes for which it was used?

A. I should say twenty-five dollars an acre.

Q. What was the demand, if any, for real estate in that vicinity in the spring of 1901?

A. Very little.

Q. What was the prospects of the town of Cleveland at that time?

A. Not very good.

Mr. Wrightsman:

Q. Not very good?

A. Not very good, no, sir.

Mr. **Biddison**: You may cross-examine.

Cross-examination by Judge **Dale**:

Q. Doctor, you and others had surveyed a railroad through there before that time, hadn't you?

341 A. Yes, sir.

Q. Where from?

A. Well, from Muskogee to Enid; and I think was interested a little in a scheme from Coffeyville to your city.

Q. The Katy Railroad was built on the line of survey, practically which was made by you, and others was it not?

A. Yes, sir.

Q. And that was made before 1901, wasn't it?

A. Well, I think along about that time, judge. I am not right sure of the date.

Q. 1900, I believe?

A. About 1900, I think.

Q. Afterwards that was practically adopted by the Katy, was it not?

Mr. **Wrightsman**: What is that?

Judge **Dale**:

Q. Afterwards that survey you made was practically adopted by the Katy?

A. I believe we tried to get it adopted, but the Katy repudiated it.

Q. They went along the same line?

A. Yes, they went over the same country.

Q. Now, you had a newspaper there, did you?

A. Yes, sir.

Q. And that newspaper, as well as you, would tell everybody that you saw that you were going to get a railroad in there pretty soon, wouldn't it?

Mr. **Biddison**; We object to the contents of that newspaper at that time.

Judge **Dale**: I think it is a fair question.

The **Court**: It is not for the purpose of proving the contents of the newspaper.

342 Judge **Dale**:

Q. How about that, Doctor?

A. Well, of course we were all of us pushing railroads. You had about one——

Q. You expected——

Mr. **Wrightsman**: Let the witness answer.

Judge **Dale**: You expected to get one soon, didn't you?

A. I didn't have a great deal of expectation.

Q. You put money into surveys, didn't you?

A. Yes, sir, a little.

Q. You did that with the expectation or hope of getting a railroad, didn't you?

A. Certainly.

Q. You used to tell us over at Guthrie you were going to get a railroad right off, every time you came over there?

A. Not right off.

Q. Well, in the very near future, is the way you put it?

A. Yes, sir.

Q. You told other people that?

A. Yes, sir.

Q. And you were sincere in that, wasn't you?

A. Yes, sir.

Q. And that was the general impression in that community, wasn't it?

A. Well, to a great extent I expect it was, yes sir.

Q. Now, the town of Cleveland at that time, you claimed was about seven or eight hundred people, didn't you?

A. In 1900?

Q. In the spring of 1901.

A. I expect it would have went six hundred, anyhow.

Q. You think it would have gone six hundred?

A. Yes, sir.

343 Q. And it was the gateway to the Osage Country?

Mr. Wrightsman: Objected to, as discriminating against Blackburn, and other large towns on the Arkansas River; and calling for a conclusion.

Q. It was a business point for considerable of the Osage Indian country east of there, was it not, Doctor?

A. Yes, sir.

Q. And it was a town enjoying a good trade and mercantile business?

A. For its size, it was.

Q. How many banke were there in 1901?

A. Well, I think the second bank was established there in 1901; I am not right sure; I think it was the spring of 1901, that the second bank was established.

Q. You have been in the banking business there practically ever since that town opened, have you not?

A. Well, the second year after the opening; 1895, I think.

Q. Do you know how many feet there was left between the original townsite and this Wagg Addition?

A. I do not, Judge, the exact number of feet. There was a few feet left.

Q. Two or three feet?

A. Well, I think more than that. It was wider at one end of the townsite that the other; the line was not established well, and, as I remember, we didn't know the exact number of feet. So the town was platted and laid out there pretty well up to the line in places, or at one end, rather, and left that vacant.

Q. But it wasn't any street regularly laid out between the old town and the Wagg Addition, the Herbert land?

A. Whatever number of feet was there, of course was platted as public domain.

344 Q. It was left there?

A. **It was left there.**

Q. And it was never contemplated that that would become a street of the usual width when the Herbert Addition was platted, or the Wagg?

Mr. BIDDISON: We object to that as immaterial, and not proper cross-examination.

The COURT: Objection sustained.

Judge DALE: Save an exception.

Judge DALE:

Q. Doctor, you were a part of the Jordan Valley Town Company, were you?

A. Yes, sir.

Q. And at that time did you sell that Sloan eighty?

A. 1901, I think it was; I think in the spring of 1901.

Q. Now, that was owned by a number—how was that owned, that Sloan property?

A. Owned by the townsite company; owned by the Jordan Valley Town Company.

Q. Was the Jordan Valley Town Company in debt at that time?

A. No, sir.

Q. How did you happen to sell that?

A. Well, the town company wanted to dispose of their holdings there.

Q. To get some money out of it?

A. No, they just wanted to get rid of it.

Q. They wanted to get some money out of it?

A. No, not specially in need of it.

Q. Didn't any of you want any money out of it?

Mr. WRIGHTSMAN: I understand the question that you did not especially need the money?

A. No, not especially.

345 The COURT: Gentlemen; one at a time, please.

Judge DALE:

Q. Now, Doctor, as a matter of fact, this Herbert eighty was pretty good farm land, wasn't it?

A. Fairly good, yes, sir.

Q. In your judgment was the reason- value of farm lands of that class twenty-five dollars, or thirty dollars?

A. Yes, sir.

Q. That is your judgment?

A. Yes, sir.

Q. And you are basing your values of this property entirely upon its value as farm land?

A. At that time, yes, sir: entirely as farm land.

**Judge DALE: That is all.**

Redirect examination by Mr. **Biddison**:

Q. What did you sell that Sloan Addition for?

A. $1850.00.

Q. Eighty acres of it?

A. There was seventy-nine acres, I think. One acre had been——

Q. Seventy-nine acres?

A. Seventy-nine acres, I think.

Mr. **Biddison**: That is all.

The **Court**:

Q. Wait a minute, Doctor. What proportion of the old townsite, or the original eighty acres of Cleveland, was improved up to the summer of 1901?

A. Well, that would be——

Q. I mean built on for business or residence purposes.

A. I presume that one would be safe in saying that it was up to forty per cent., perhaps, of the lots.

Q. Forty per cent.?

A. I would guess something like that.

346 Q. At that time, was there any growth in your population, so as to create a demand for residence or business lots?

A. Well, very little demand. A great many of them were selling for taxes.

Q. At the time you sold that eighty acres,—you say the townsite originally had eighty acres?

A. Well,they had this eighty acres, and they purchased the additional eighty acres.

Q. And never platted it?

A. Well, yes, sir, they platted it at the time that they purchased it, but as lots wouldn't sell, they went, I think, into court and had it——

Q. Had the plat vacated?

A. Yes, sir.

Q. And then sold it again as a tract?

A. Yes, sir, as a tract.

Q. Now, what time was that sale made?

A. I think the spring, perhaps in May or June of '91.

Q. 1901, you mean, or 1891?

A. 1901.

Q. 1901?

A. Yes, sir. I am not right positive about that. I was not in the country at the time, but my recollection is it was the spring of 1901 that it was sold.

Q. That has since been re-platted, and is being used for business and residence purposes?

A. Yes, sir.

Q. How is that located, with reference to desirableness for residence and business purposes, as compared with the Herbert eighty?

A. Well, Judge, that is a matter of taste, a good deal.

347 Q. Of course, it is a matter of judgment.

A. It is very desirable property out there. It is high, rollng land, and the lots lie well. Overlooking the river, makes it very esirable residence property. There are, however, some very desirble residence properties on the Wagg Addition, the Herbert Addiion.

Q. What proportion of the Sloan eighty is now probably improved by residence or business?

A. Well, there is a very little business on it. There is an ice lant, and a gin, matter of business. The balance is all residence; think I would be safe in saying that seventy-five per cent. of the ts are built on.

Q. On the Sloan Addition?

A. On the Sloan Addition.

Q. What proportion on the Wagg addition are occupied?

A. Nearly the same. I may have put that a little high. It is rom sixty, I would think, to seventy-five per cent.

Q. What is your estimated population now?

A. Well, I would estimate it twenty-five hundred.

Q. Have you been incorporated as a city?

A. No, sir.

Q. Haven't changed your town incorporation?

A. No, sir, not yet.

Q. The estimated value, or saleable value, that you placed upon he property, was based upon the theory of its adaptability for farmng purposes, and the lack of any demand for it at that time for usiness or residence purposes, was it?

A. Yes, sir. There was no demand for additions at that time, as remember.

Q. That is, as to whether it would have been adapted to that purose; there was no demand for it?

348 A. It was well adapted to the purpose; but there was no demand for it.

Q. Nothing that would fix a price on it additional to farm roperty adjacent to town?

A. Yes, sir, I think you are right.

Recross-examination by Judge Dale:

Q. As a matter of fact, Doctor, it was platted during the summer of 1901, wasn't it?

A. The Wagg Addition?

Q. Yes.

A. Well, I am not sure about those dates, but I think so; that is my recollection, that it was during the year 1901; whether in the spring or fall——

Q. And lots began selling at that time, or very shortly after it was platted, did they not?

A. Well, I am not clear on that, because I do not remember dates very well. I think, however, it was platted in 1901. I remember I had been west, and when I came home I understood it had been platted, I think. I fix the date from that, more than anything else.

Q. They began building there immediately after that, didn't they?

A. I think so, yes sir.

Q. Now, you have spoken as to the number of people on the original townsite being about six hundred at that time, and you fix the amount of improved property——

A. I beg pardon.

Q. You fix the amount of improved property upon the original eighty. I will ask you if a part of that eighty, that original eighty, was well suited for business or residence property?

A. Yes, sir.

Q. Was it all well suited for business and residence purposes?

A. Yes, sir.

349 Q. Was there any draws running through it?

A. No, sir, except a little draw in a park at that time.

Q. How much did you have out as a park?

A. I think a couple of acres; two or three acres; probably three acres.

Q. How about the southwest part of the eighty, the original eighty, was that well adapted for residence purposes?

A. Well, I think there is probably an acre down in the southwest corner, that has a little ravine in it. That has since been filled up. It is occupied by the railroad.

Q. Well, isn't there a draw in the southeast part, also?

A. Well, that southeast part is the draw that I speak of.

Q. How many acres did the draw cut off from the other part of the town, and take out?

A. Well, it is all under improvement now.

Q. How many did it take at that time?

A. How much did it take?

Q. Yes, how much did it cut off from the other portions of the town?

A. Oh, it is not much of a draw; it don't cut off anything; it simply runs through there.

Q. How much was there south and southeast of the draw?

A. South of the draw?

Q. Yes.

A. The draw runs south.

Q. How much was there east of it, on the original eighty?

A. Three or four acres.

Q. Are there any business buildings upon this Wagg property now?

A. I think not. I don't recollect of any business property over there, unless it be a supply store, or something like that. I think there is probably a supply store over there. That is on the Swan Addition, yes sir.

350 A. Any lumber yards?

A. There are lumber yards, but I think they are on the Swan Addition. I am not sure about that. No, I think there are now two lumber yards on the Wagg Addition.

Q. Doctor, you heard that there was some question about the title to this Wagg property, in a general way?

A. Yes, sir.

Q. And you know that that prevented people from going upon that property and buying it, and dealing in it, as they otherwise would, do you not?

A. Well, I think it has made some difference in the dealings, yes, sir.

Q. And it has retarded the growth of that Wagg Addition, has it not?

A. I should say so; yes, sir.

Q. And at the time, now, it was laid out, or very shortly afterwards, these questions of title began being about that town, did they not?

A. Well, I heard nothing of it for possibly a year or two after it was laid out. I think possibly a year or eighteen months I heard no question.

Q. Did you ever purchase any property on the Wagg Addition?

A. No, sir.

Q. Not interested in any manner there at all?

A. No, sir.

Q. Now, you say that very shortly after it was laid out, some of the lots—improvements began on some of the lots, is that right?

A. Yes, sir.

Judge Dale: That's all.

351 Redirect examination by Mr. Biddison:

Q. I will ask you, Doctor, if the only question, prior to the bringing of this action, that you ever heard about the title of that property was over the lack of Mr. Herbert's signature to the deed?

A. Yes, sir, that is all.

Judge Dale: I will admit that that is all. That is the evidence in this case.

The Court: Call your next witness.

J. E. Morphis, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Biddison:

Q. State your name.

A. Morphis, J. C.

Q. Where do you reside?

A. Cleveland.

Q. How long have you lived there?

A. I think about nine years, to the best of my recollection.

Q. What official position, if any, do you hold there?

A. I have been postmaster since the first of January—the 15th of February, rather.

Q. Are you acquainted in and about that town?

Q. Do you know the values of real estate in and about that town in 1901?

A. I know what it was selling for at that time, that is the only way.

352 Q. You know what it was selling on the market for?

A. Yes, sir. That is the only way I have to form an opinion as to the value of it.

Q. Were you acquainted at that time with what is now known as the Wagg Addition to the town?

A. Yes, sir.

Q. From what you know of the values of real estate in and about that community at that time, have you an opinion as to the value of that fifty-five acres, constituting the Wagg Addition, in the spring of 1901?

A. Land was selling then from——

Judge Dale: I object to that. What was the reasonable market value?

A. Well, I should say twenty-five dollars.

Mr. Biddington:

Q. An acre?

A. An acre.

Mr. Biddison: There isn't any question about these other facts, is there, Judge, in regard to the condition of the town, the townsite, the extent of the improvements, etc.?

Judge Dale: We might apply to you.

Mr. Biddison:

Q. Mr. Morphis, about what was the population of Cleveland at that time?

A. In 1900, my best recollection is—I took the census there in 1900——

Judge Dale: I object to that, because that is not the time.

Mr. Biddison: That is simply the foundation.

Judge Dale: Oh, go ahead.

A. It was in the neighborhood of three hundred; not quite three hundred at that time, is my best recollection.

353 Mr. Biddison:

Q. What increase had there been between the time of your taking the census in 1900, and 1901?

A. I don't think there was very much.

Q. You had been living there in the meantime?

A. Yes, sir.

Q. Do you know what the prospects for a railroad, or the immediate upbuilding of the town, was in the spring of 1901?

Judge Dale: I object to that as immaterial. No, I withdraw the objection.

A. Well, I don't think we had any prospects for any railroad at that time.

Mr. Biddison:

Q. What do you know as to the value—as to the extent of the demand for real estate in and about the town at that time, and particularly the demand for town lots?

A. There wasn't very much demand for town lots. I bought some town lots.

Q. About that time, about what proportion of the original townsite was improved?

A. You mean the dwellings, and business?

Q. Yes. Put it altogether. About what proportion of the original townsite was improved, and what proportion was unimproved?

A. Well, it was scattered so, it is hard to give an estimate. There was improvements in all parts of the town, dwellings and all, and it is hard for me to estimate. I should say there was something over half.

Q. At that time——

Mr. Biddison: I believe I asked that question. You may cross-examine.

354 Cross-examination by Judge Dale:

Q. Was this eighty acres a pretty good piece of agricultural land?

A. I didn't understand you.

Q. Was this eighty acre tract a pretty good piece of agricultural land?

A. Yes, sir, it was considered fair upland land.

Q. Worth about twenty-five or thirty dollars an acre for farming purposes?

A. Well, land was selling at that at that time.

Q. For farming purposes?

A. Somewhere between eighteen and twenty-five dollars. Well, I might say from fifteen to twenty-five dollars.

Q. You might say thirty, might you not?

A. I don't remember of any selling for thirty.

Q. Don't you know of some three or four miles out selling for thirty dollars an acre?

A. I don't remember any at that time.

Q. Well, recently afterwards, or before that time?

A. I don't think we had any land to sell hardly for that much until the railroad—until it was known that the railroad was going through there.

Q. What was your business before you became postmaster?

A. I was in the milling business awhile; I handled some cattle there; and various things.

Q. What part of the original townsite were you located in?

A. In the northeast part.

Q. The business street was just one street east of the Herbert Addition, was it not?

A. Yes, sir, one block; at least it joined, the block joined.

355 Q. The block, the west side of the business street, the lots west of the business street were in the block which joins the Herbert Addition?

A. Yes, sir.

Q. There couldn't be any residences west of the business part, without going over on the Herbert tract, could there?

A. No, sir.

Q. Now, you know about when this Wagg Addition was laid out?

A. My recollection is it was in 1901.

Q. Very shortly after that, they improved, and put up buildings on there, did they not?

A. Yes, sir, they built a few houses there.

Q. That is a very desirable residence part of that town, is it not?

A. One part of it is as desirable a part as any land that joins the townsite.

Q. What part is that?

A. That is directly west from the street running east and west—I have forgotten the name of it, Cherokee Street, I believe it is, out by the Merchants Hotel.

Q. Cherokee Street?

A. Yes, sir.

Q. About where does that strike the Wagg Addition?

A. It strikes it, I should say, two-thirds of the way from the north line, going south.

Q. About the center of the eighty?

A. No, a little to the south of the center of the eighty.

Q. The land out there, for some considerable distance around, on the Wagg Addition, is pretty well up, lies nicely?

A. It is rolling, and high.

Q. Overlooks the town?

356 A. Well, it does not overlook the town, because that part of the original town is high, and the original townsite is rolling.

Q. Now, for strictly farming purposes, wouldn't you say this Wagg Addition, that part of it, the north fifty-five acres, was worth as much as thirty dollars an acre?

A. No, sir, I wouldn't say thirty dollars. I was forming my opinion from the way land was selling there. I would say twenty-five dollars an acre, for any purpose, at that time, you could use it for.

Q. I am not asking about that. I say you put that value on for farming purposes. You say that is the only purpose it could be used for at that time?

A. No, sir, I don't remember saying that.

Q. Is that your judgment?

A. For anything you could use it for at that time, that would be my opinion of the value, the way land was selling.

Q. Now, you could use it for any other purpose—if you could use it for townsite purposes, it would be worth a good deal more than twenty-five dollars an acre?

A. Well, if the town was growing, it would certainly be worth more for townsite purposes.

Q. I am asking, you, then, if you fixed your values upon this property for farming purposes only?

Mr. BIDDISON: I object to that. He says for any purpose for which it could be used.

Judge DALE:

Q. I am asking him the direct question. Was the value of that land placed there by you, because it was only used for farming purposes?

A. At that time, I don't think it could be used for anything else.

357 Q. You don't think it could have been used——

A. I mean, I don't think there was any demand for it for anything else.

Q. What do you mean, an immediate demand, is that it?

A. Well, I think I have answered the question just as plainly as I possibly can.

Q. Now, let me ask you a question: Taking into account the prospects of the town of Cleveland, the location of this land to the town of Cleveland, and the fact that it might become usable for townsite purposes, what would you say the value of that property was?

A. I should say, with the prospect of that town at that time, that twenty-five dollars was a fair valuation of it.

Q. Well, it would have been worth that if it had been two or three miles from town, wouldn't it?

Mr. BIDDISON: I object to that as argumentative.

The COURT: Objection overruled.

Mr. BIDDISON: Exception.

A. The closer—Even for farming purposes, if you are a mile or two miles of a town, or a little village, I should think the land would be about the same price for farming purposes.

Judge DALE:

Q. Well, now, good land, land of this character, for farming purposes, two or three miles from Cleveland, was worth twenty-five dollars an acre, wasn't it?

A. Deeded land all the way from fifteen to twenty-three dollars an acre, is my recollection at this time; the land that sold, that I recollect now.

Q. Where did this twenty-three dollar an acre land lie?

A. Right east of the townsite, the Sloan Addition. I think it sold for eighteen hundred and fifty dollars somewhere about that time. I don't remember the date.

358 Q. Now, do you know of any strictly farm lands selling around there?

A. Yes, sir, Mr. Powell, bought an eighty joining this town on the southeast, cornering with it, that was better farming land that the upland. It lies pretty well on Cedar Creek.

Q. Well, is it cut up with the creek?

A. It is cut up some with the creek, the creek runs through it, but there is some very pretty farming land three.

Q. The bluff runs down it a ways, does it not?

A. The bluff is on the south.

Q. On the south part of the eighty?

A. Yes, sir.

Q. How much does that take?

A. I should judge about twenty acres.

Q. How much does the creek take of it?

A. I really couldn't say.

Q. Give your estimate now.

A. I should think there was about sixty acres of good farming land on the eighty, somewhere in the neighborhood of sixty acres.

Q. Creek bottom?

A. Yes, sir.

Q. That sold for how much, you say?

A. $1050, I think, that eighty.

Q. Do you know under what circumstances it sold, whether there was a mortgage upon it?

A. I think not. It belonged to Mr. Burdoff (?), and it was an allotment, as I understand it.

Q. An Indian allotment?

A. Yes, sir.

359 Q. Was it improved in any way?

A. There was probably ten or fifteen acres in cultivation on it.

Q. Indian allotments sell for as much as other lands?

A. I should think so.

Q. Well, do they?

Mr. Wrightsman: Objected to as argumentative. I suppose the court will take judicial knowledge of the acts of Congress, giving patent in fee simple to the Jordan Cherokee lands.

Judge Dale:

Q. Was this one of the Jurdan tracts?

A. I think he was a Cherokee.

Q. Was that in an estate, sold out of an estate?

A. At that time I don't remember whether it was or not. I didn't remember whether Mr. Burdoff died afterwards or before.

Q. Do you know of any other lands selling around there?

A. The Lee Jordan place sold, joining it on the northeast, the Box place.

Q. The Lee Jordan place, was that sold under a mortgage?

A. I don't know. It was not sold at public auction, I don't think.

Q. The Jordan lands were all foreclosed, were they not?

Mr. Wrightsman: No. Objected to.

Judge Dale:

Q. All heavily encumbered, were they not?

A It was understood they were. I didn't see any of the records, or examine any records.

Q. Well, you know there was a two per cent. a month mortgage on the Jordan lands for nine thousand dollars, do you not?

A. No, sir, I do not. What the interest was, or the mortgage, I don't know.

Q. Held by Dr. Sutton, the mortgage?

360 Mr. WRIGHTSMAN: Objected to as improper cross-examination, prejudicial, and improper.

The COURT: Objection sustained.

Judge DALE: I am not going to prejudice him. It is a matter of contract. I want to find out the circumstances under which the sales were made.

Judge DALE:

Q. You say twenty-three dollars an acre is the most you know of any land seling for, before the railroad went through Cleveland?

A. That is my recollection. It is possible there was some sold higher, but that is my recollection.

Q. Did you own land in Wagg Addition?

A. No, sir.

Q. Ever buy any?

A. No, sir.

Q. Have you any interest in it?

A. None whatever.

Q. Were you living in Cleveland at the time of the raid upon the Wagg Addition?

A. The raid?

Q. The raid, yes; at the time a lot of people went out there and settled on it and tried to take it for a townsite?

A. No, sir.

Q. You was not living there at that time?

A. No, sir.

Judge DALE: That is all.

Redirect examination by Mr. BIDDISON:

Q. I will ask you if you knew of the Kinney tract, north of town, selling about that time?

A. Yes, sir, somewhere about that time.

361 Q. That was sold after the foreclosure, by the purchaser at the foreclosure, was it not?

A. That is my understanding.

Judge DALE: Objected to as not the best evidence, and incompetent.

Mr. BIDDISON: That's all.

Judge DALE: That's all.

**George Brentnall**, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Biddison:

Q. State your name.
A. George Brentnall.
Q. Where do you reside?
A. Cleveland.
Q. How long have you lived there?
A. I have lived there about five or six years; in Cleveland proper.
Q. Were you acquainted in that vicinity in the spring of 1901?
A. Yes, sir.
Q. Lived there at that time?
A. Yes, sir.
Q. You know the tract of land known as the Herbert tract, to the west of Cleveland, the eighty acres?
A. I do.
Q. Describe that tract of land, as to how it lays.
A. As to boundaries?
362 Q. No, as to slopes, and the way the land lays.

The Court: That has been described sufficiently. If he says he is acquainted with it, that is sufficient, I think. We have been over it a number of times with other witnesses.

Mr. Biddison:

Q. I will ask you as to whether or not there is any waste land on that?
A. Well, none that I would consider waste land. There is some draws in it, but none that I would consider waste land. The draws are not sufficient to waste the land.
Q. Are you acquainted with the values of real estate in and about Cleveland in the spring of 1901?
A. Some what, yes, sir.
Q. From what you know about the values of real estate in and about that town in the spring of 1901, could you form an opinion, or have you an opinion as to the fair market value of the property known as the Wagg Addition to Cleveland, in that spring?
A. Yes, sir.
Q. State what the fair market value of that tract of land was in the spring of 1901?
A. I would consider a good price for it, twenty-five dollars per acre.

Mr. Biddison: Cross-examine.

Cross-examination by Mr. Clark:

Q. Have you any interest in the Wagg Addition?
A. Not personally, no.
Q. You are one of the trustees in a church located on the Addition, are you?
A. No, sir. I am a member of that church, but not one of the trustees.

Q. The Drowns are also members of that church, are they not?

363 A. No, sir.

Q. Now, you came to Cleveland in what year?

A I came to Cleveland in the year 1895.

Q. 1895?

A. That is, in the vicinity, and located south of Cleveland seven miles.

Q. You answered counsel, if I understood you correctly, that you had lived at Cleveland five or six years, is that correct?

A. Yes, that is correct.

Q. Now, what year does that date from; do you know?

A. It dates from a couple of years after the time I bought the tract of land cornering with the townsite, northwest from Dr. Baker; I don't remember the year.

Q. Now, that was five or six years ago?

A. It was five or six years that I moved, but I owned the place a couple of years before that.

Q. Do you live in the town of Cleveland, or on that place?

A. I live on that place joining the town, cornering with the town.

Q. That corners on the northwest, you say?

A. Yes, sir, it corners with the Herbert eighty.

Q. It corners with the Herbert eighty?

A. Yes, sir.

Q. On the northwest of the Herbert eighty?

A. Yes, sir.

Q. What did you give for that land?

A. Nine hundred and twenty-five dollars.

Q. How much of it is rocky land, and hilly?

A. Well, it is all sloping.

Q. How much of it is unfit for cultivation?

A. I was just trying to think. You see the rocky part is not all in one place.

364 Q. No, but about how much of it is unfit for cultivation?

A. I would say about four or five acres; I never estimated it closely.

Q. How much of it is in cultivation?

Mr. Wrightsman: Objected to as incompetent, irrelevant, and immaterial.

The Court: Overruled.

A. I have thirty-five acres in cultivation. The rest I use as a pasture.

Mr. Clark:

Q. Now, in placing your valuation on the Herbert eighty, you estimate it as being worth that much for farming purposes, do you not, Mr. Brentnall?

A. I did not.

Q. Well, I will ask you how much you estimated it as having been worth at that time for farming purposes only?

A. Well, I was told——

Q. Oh, I didn't ask you as to what you were told. Have you a judgment as to what it was reasonably worth at that time solely for farming purposes?

A. I will have to explain to you my reason for making that estimation.

Q. I don't want to know your reason. I want to know whether or not you have an opinion as to the market value of that land, taking into consideration solely its value for farming purposes?

A. I have.

Q. Now, what do you say that it was fairly and reasonably worth for farming purposes, regardless of any other value that it might have?

A. Eighteen to twenty dollars an acre.

Mr. CLARK: That's all.

Mr. BIDDISON: That's all.

365 J. A. POWELL, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. BIDDISON:

Q. State your name.

A. J. A. Powell.

Q. Where do you reside, Mr. Powell?

A. I am residing in Cleveland at the present time.

Q. How long have you lived there, or in that vicinity?

A. I came there in the spring of 1900.

Q. Lived there ever since?

A. I have lived joining the city.

Q. Since you have been there, have you become acquainted with the values of real estate in that vicinity?

A. Well, when I came there, I came there for the purpose of buying property there, and of course that brought me in contact with people that had property to sell, and I formed my acquaintance in that way.

Q. You then do have an opinion as to the market value of real estate in the spring of 1901 in that vicinity?

A. Well, I know what several pieces was offered me for at that time.

Q. From what you know of the value of real estate in that vicinity at that time, have you an opinion as to the fair market value of what is known as the Wagg Addition to Cleveland, in the spring of 1901?

A. Well, of course I have some idea in regard to it.

Q. You may state what, in your judgment, was the value of that fifty-five acre tract of land in the spring of 1901?

A. Well, I base my judgment on other property that was offered me right joining the town.

Q. Well, what, in your judgment, was it worth?

366 A. The property was offered me right joining the town——
The Court: Just answer his question, first, what you consider the value of this land.

A. Well, I couldn't say it was worth—Well, I wouldn't have given fifteen dollars an acre for it.

The Court:

Q. That is not the question, because you might not want to buy it. What would it have sold for?

A. I would say that, comparing it with other property that was sold there at that time, that fifteen dollars an acre would be a good price for it.

Q. You think fifteen dollars was the reasonable market value of the land?

A. I think it was a reasonable price for it.

The Court: Proceed.

Mr. Biddison: You may cross-examine.

Cross-examination by Judge Dale:

Q. Mr. Powell, do you own any lots in the Wagg Addition?

A. No, sir, I do not.

Q. Does your daughter own any?

A. My daughter has some.

Q. When did she purchase?

A. Now, really, I don't know as I can tell you.

Q. How long after it was laid out as an addition?

A. She must have purchased them along in '92 or '93. I am not certain whether it was '92 or '93.

Q. Where did she buy there, in what part?

A. Well, she bought on the south side of the street, one—a block and a half west—two blocks west of Main street.

Q. What did she pay?

A. Now, I can't tell you there.

367 Q. Haven't you enough interest in her—you say you know all about the value of property there—to know what she paid for those lots?

Mr. Biddison: To that we object, as not proper cross-examination.

The Court: Objection sustained.

Judge Dale:

Q. Do you know when this land was laid out as an addition?

A. When it was platted? That is, the Herbert place?

Q. Yes.

Mr. Wrightsman: Objected to as not proper cross-examination, and incompetent, as to what time.

The Court: Overruled.

Judge Dale:

Q. What do you say, do you know when it was laid out as an addition?

A. My remembrance is that it was in '91, in the spring of '91.

Q. You mean the spring of 1901?

A. 1901, yes, sir.

Q. Very shortly after that they began putting up residences there did they not?

A. Well, there was some property changed hands there at that time, yes.

Q. Very shortly after it was platted. Do you know the number of those lots that your daughter bought?

Mr. Biddison: We object to any cross-examination upon that.

The Court: Objection sustained.

A. She is here; she can testify for herself.

Judge Dale:

Q. What is your daughter's name,—Gilbert?

A. Mrs. O. A. Gilbert.

368 Q. O. A. Gilbert?

A. E. P., I think she signs her name.

Q. Eva P.?

A. Yes, sir.

Q. This deed to her purports to have been made on the second day of November, 1901.

Mr. Wrightsman: We object to counsel continuously asking these questions.

The Court: Objection sustained.

Judge Dale: This is very soon after, and before any railroad had been there, or anything of the sort.

The Court: Well, that is true, but he has not been asked anything about town lots. He was asked about the value of land, as a whole, before it was platted.

Judge Dale:

Q. You don't think that land was suitable for townsite purposes, do you?

A. I guess it was. It could have been, if there had been any town to be made there. You can build a town on most anything, if you have a chance.

Q. Well, they did begin building immediately after it was platted, did they not?

A. Why, I think they did, some; some cheap houses built down there at that time.

Q. Now, was the north fifty-five acres of this land the best lying for townsite purposes?

A. The north fifty-five?

Q. Yes.

A. Well, that lays at the present time further away from the railroad; it lays very nicely.

Q. It does?

A. Yes, sir.

369 Q. When was the church located there?

A. The church was located there in the fore part of the vinter of '91.

Q. 1901?

A. 1901.

Q. The forepart of the winter of 1901?

A. Yes, sir.

Q. Where is that church located?

A. It is located about—Let's see. It is on the corner of the first lock in the Wagg Addition, west from that Dunlap hotel.

Q. On Cherokee street?

A. I don't know what street it was. I never paid any attention to he streets.

Q. That was located in the fall of 1901, was it?

A. Yes, sir.

Judge **Dale**: That's all.

Mr. **Biddison**: That's all.

L. M. **Drown**, being produced and sworn as a witness on behalf f the defendant, testifies as follows:

Direct examination by Mr. **Biddison**:

Q. State your name.

A. L. M. Drown.

Q. Where do you reside?

A. Cleveland.

Q. How long have you lived there?

A. Since May, '98; 1898.

70 Q. Are you acquainted with S. R. Wagg?

A. I am.

Q. You are one of the defendants in this action?

A. I am.

Q. Are you acquainted with Mrs. Herbert?

A. I am.

Q. With W. H. Herbert in his lifetime?

A. I am, or was.

Q. How long have you been acquainted with Mrs. Herbert and Mr. erbert?

A. Since shortly after going to Cleveland in 1898.

Q. How long have you known the defendant S. R. Wagg?

A. Since 1887.

Q. Where were you first acquainted with him?

A. In Appleton, Wisconsin.

Q. You came from that country to Cleveland?

A. I went from Appleton to the Choctaw Nation, and then was in e Cherokee Nation from 1894 to 1898, and came from the Cherokee Nation to Cleveland.

Q. You recollect the occurrence of Mr. Wagg making a loan to the erberts, of a thousand dollars, on their homestead near Cleveland?

A. Yes, sir, I do.

Q. You were living in Cleveland at that time?

A. Yes, sir, I was.

Q. What, if anything, did you have to do with the making of that loan?

A. I had really nothing to do with making the loan. My father carried on the correspondence for Mr. Herbert, I think, in his behalf,
and advised Mr. Wagg to make the loan. I think I had a
371 letter from Mr. Wagg, asking my opinion in regard to the
value of land around there, and I believe that I wrote him a
letter in regard to what I considered the value of lands around there.

Q. Subsequent to that time, did you have some connection with the matter assisting Mr. Wagg in the conclusion of the loan, or putting it in condition?

A. Yes, sir. I think the first connection I had with the loan was in the early part of November, 1899. My attention was called to the fact that the land was advertised at a tax sale.

Q. What, if anything, did you do with reference—First, did you see the advertisement of the sale?

A. I did.

Q. What, if anything, did you do with reference to that?

A. I wired Mr. Wagg that the land was advertised to be sold——

Mr. Clark: Wait a minute. Objected to as not the best evidence.

The Court: Objection sustained.

Mr. Biddison:

Q. You wired Mr. Wagg, you say?

The Court: I have sustained the objection to that.

Mr. Biddison: I thought Your Honor sustained the objection to the contents of the wire.

The Court: The wire without the contents would be invaluable.

Mr. Biddison: It is necessary to lay a foundation, I suppose. I want to do it, for the purpose of laying the foundation.

The Court: Have you the telegram?

Mr. Biddison: No, sir, I want to show the loss of it. I want to
show it was left here with this court at the former trial of this
372 case, and never been seen since.

The Court: Proceed.

Mr. Biddison:

Q. Did you wire Mr. Wagg?

A. I did.

Q. Did you receive any response from him, in answer to that wire?

A. Yes, sir.

Q. What response did you receive from him?

Mr. Biddison: I do that for the purpose of identifying a letter, as a handier way. The letter is already in evidence.

A. I received a letter of authority to pay the taxes.

Mr Clark: Wait a minute.

The Court:

Q. You say you received an answer by letter?

A. I received a letter in response to my wire. I believe I received a wire, but I am not positive, that he would forward the money.

Mr. Biddison:

Q. Subsequent to that time, what action, if any, did you take with reference to that land?
A. I paid the taxes for him.
Q. Do you know the amount of the taxes you paid at that time?

Mr. Clark: Wait a minute. Objected to as not the best evidence. He took a tax receipt, I presume.
Mr. Biddison: I suppose the fact is equally competent to prove by any method.
The Court: Well, it is a matter of record, if he paid the taxes at that time, and the law requires a record to be kept of it; and I suppose that is the best evidence. The law requires a receipt to be given at the time.
Mr. Biddison: It does not make that the only evidence of the fact.
The Court: No, but where the law requires a thing to be done, and requires it to be made of record, the record is the best evidence of the fact, as a matter of law.
373 Mr. Biddison: Exception.

Mr. Biddison:

Q. What further, if anything, did you have to do with the land in controversy, subsequent to the payment of the taxes in the fall of 1899?
A. Nothing.
Q. Did you after that time have anything to do with it?
A. I looked after the cutting of some hay there, at Mr. Wagg's request, the following summer, with Mrs. Herbert's consent.
Q. Do you recollect being present in the spring of 1900, at the Herbert homestead, with Mr. Inge and Mr. Wagg?
A. I do.
Q. At that time was there a conversation with reference—between the parties, with reference to the arrears of taxes and interest on the land?
A. There was.
Q. You may state what conversation was had at that time.
A. Mrs. Herbert stated that she thought they would soon be able to pay the interest and taxes that were in arrears; they had expected to pay it before; but she had just received a letter from Mr. Herbert, and he was ill, I think, at that time, and said she had a great deal of trouble hearing from him, and she thought her letters had been tampered with, I think, and quite a bit of information regarding her correspondence with Mr. Herbert. But Mr. Wagg told her at that time that of course he had asked for the deed, and placed it of record, on account of the land being advertised for sale, and went on to tell her that he did not mean to ever use that fact harshly, but would give her every opportunity to pay it; what he wanted was his interest, and the money he had paid out refunded; and

he told her that he would like to have the hay to apply on the delinquent interest and taxes.

374 Q. *Why* reply, if any, did she make to that?

A. She consented to that arrangement.

Q. Was there anything said at that time with reference to her otherwise disposing of that hay? Speak of having had an offer on the hay?

A. I don't think it was, at this time; I don't remember; I think Mr. Wagg had written me before he came down——

Mr. CLARK: Wait a minute. I object to what he had written unless you produce the letter.

A. I think not at that time. The only other conversation at that time was that Mr. Wagg assured Mrs. Herbert that he would never deprive her of her home.

Judge DALE: I object to that.

A. That she need not be afraid of losing her home; he would never deprive her of her home.

Mr. BIDDISON:

Q. Was there any conversation between the parties at that time as to her right to redeem the land?

A. Not that afternoon. The next morning, there was.

Q. Was you present at the conversation the next morning?

A. I was.

Q. Who else was present?

A. Mr. Wagg and I. She sent for us to come out.

Q. Now, you may state what conversation was had at that time.

A. The matter of the escrow deed was referred to, and Mrs. Herbert informed us that she had been informed at that time, or previous to that time, by a lawyer in Pawnee, that an escrow deed did not carry title; that it was simply ad-itional security for the mortgage. Mr. Wagg replied that the man that told her that was no friend of hers.

Q. What else was said, if you recall anything further?

375 A. Nothing that I can think of, of any consequence.

Q. Now, subsequent to that time, did you take the hay crop?

A. Yes, I had the hay crop cut, and a portion of it baled. There was considerable of it that was spoiled by rain, before it was baled.

Q. Do you know about how many acres there was of it, that you took?

A. There was about forty-five acres, according to my best recollection and judgment.

Q. What did you do with the hay off of that tract?

A. We had part of it baled that was not spoiled, and ricked and shedded off, and sold it out.

Q. Do you know about how much hay you got off of the place?

A. No, I do not; I don't know how much.

Q. Do you know what it sold for?

A. I don't remember now the amount that it sold for. I kept a memorandum book of the expenses of making, raking, baling, and hauling the hay, and gave it—kept a memorandum, also of the sales, and I reported to Mr. Wagg——

Mr. Clark: Wait a minute. I object to his telling the contents of any report, unless he produces the report.
The Court: The objection is well taken, but it is a little premature. He did not offer to state what it was.

Mr. Clark: I thought he was stating it backwards.

A. I reported to Mr. Wagg the net profits on the hay.

Mr. Biddison:

Q. Do you know how much the net profit was?

Mr. Clark: Wait a minute. I think this is giving the contents of the report.
The Court: Objection overruled.

A. My recollection is, it was between eleven and twelve dollars.

376 Mr. Biddison:

Q. Do you know about what part of the hay was lost?
A. Well, there was some hay baled that was not fit to hay. A lot of it moulded in the bale, and was given away, practically. Oh, I should judge there was fifty per cent of the hay spoiled by the rain.

The Court:

Q. How much?
A. About fifty per cent.

Mr. Biddison:

Q. Taking that that was spoiled on the ground, and all together?
A. Yes, sir.
Q. You took care of the hay the best you could, did you?
A. Yes, sir, I made a shed for it.
Q. Was the hay neglected in harvesting in any way?
A. Not at all.

Judge Dale: Objected to as incompetent, and calling for a conclusion.
The Court: Objection sustained.
Mr. Biddison: Exception.

Mr. Biddison:

Q. What subsequently did you have to do with this land?
A. I had a conversation with Mrs. Herbert in regard to the hay. She told me that Mr. Nash had offered her husband, before Mr. Herbert went away, a dollar an acre for the hay in the field. She also told me that she had heard from Mr. Herbert; that Mr. Herbert had written her not to sell the hay to Mr. Nash, because he didn't think that he would pay for it.
Q. Now, subsequent to this transaction, and after the close of the hay matter, what next did you have to do with reference to the

Wagg-Herbert mortgage, or the Herbert tract of land, that you now recall?

377 A. I was solicited by Mrs. Herbert to take the matter up with Mr. Wagg along in the winter of 1900 and 1901; I think probably along in January or February. She told me that she was worrying a great deal about the matter, and wished to get it settled, and off her mind, and be sure of her home; and she wished that I would do what I could with Mr. Wagg, and to get him to accept a part of the land in settlement of the mortgage, and release her home there.

Q. Up to that time had you ever had any suggestion from Mr Wagg of a willingness to accept, or a desire to take any portion of the land in settlement of the claim?

A. None whatever.

Q. Pursuant to that request from her, did you take the matter up with Mr. Wagg?

A. I did.

Q. Did you get any response from him?

A. I did.

Q. Those responses, the letters that were—Do you recollect the occurrence of her coming to your place of business and speaking to you with reference to a letter that she had received from Mr Wagg, in which he said that he had sold a portion of this tract to you?

A. No, I don't recollect it.

Q. Do you recollect having a conversation with her, before she executed this final deed, and while negotiations were pending for the settlement, in which she stated she had received, or showed you a letter from Mr. Wagg, in which he said he had sold a portion of the land to you?

A. I remember her telling me that; I don't remember where it was.

Q. Now, you may state what the facts were at that time, as to your having purchased an interest in this land?

378 Mr. Clark: Wait a minute. I object to that, as it must have been in writing, Wagg being in Wisconsin, and he being in Oklahoma, in Cleveland, it must have been in writing, and not the best evidence.

The Court: Objection sustained.

Mr. Biddison: Exception.

Mr. Biddison:

Q. I will ask you whether or not at that time you had purchased any interest in that land from Mr. Wagg?

A. I had not purchased any interest from Mr. Wagg until after the deal with Mrs. Herbert was closed.

Q. Now, when was the deal with Mrs. Herbert closed?

A. She gave her warranty deed——

Mr. Clark: That is not the best evidence.

Judge Dale: Oh, well, let him go.

A. On the 28th day of May, 1901.

**Mr. Biddison:**

Q. I will ask you if, at the time she spoke to you with reference to having received this letter from Mr. Wagg, there was any propositions pending between you and Mr. Wagg as to the purchase of a portion of this land by you?

A. Yes, sir, there was.

Q. Were those propositions contained in the letters that have been introduced in evidence in this case?

A. I think for the greater part. There may possibly be other letters that pertain to it. Mr. Wagg was not favorable——

Mr. Clark: Wait a minute. There is no question being asked at this time.

**Mr. Biddison:**

Q. At that time had you been discussing with Mrs. Herbert the matter of dividing the land, was that pending?

A. We had talked it over frequently.

Q. At that time had there been any agreement reached as to a division of the land?

379 A. There was an agreement reached in March, by which she agreed to give him fifty-five acres.

Mr. Clark: Wait a minute. If that is in writing, the writing would be the best evidence.

**Mr. Biddison:**

Q. Was that agreement between you and her, or in that respect, in writing?

A. Not between her and me, no sir.

Q. When was that?

A. In February, or March, 1901.

Q. Who suggested that division of the land?

A. She solicited a division, in the first place.

Q. Who suggested the division on the basis of twenty-five acres and fifty-five acres?

Mr. Clark: Wait a minute. I submit there is not evidence as what that agreement between him and Mrs. Herbert was.

Mr. Wrightsman: He has asked him if there is such a fact.

Mr. Clark: No, sir, he is telling him, and asking him.

A. It was a compromise on both sides——

The Court: Wait a minute. I sustain the object-. If there was an agreement, what the agreement is, is a proper matter to be determined.

Mr. Biddison: Exception.

**Mr. Biddison:**

Q. How was that division of the land reached, of twenty-five and fifty-five acres?

Mr. Clark: Wait a minute. I submit that there is no testimony of any agreement that he is testifying concerning, that refers to any twenty-five acres. The agreement has not been testified to.

Mr. Biddison: I am not saying it is. It is in evidence, if the

court please, that the land was ultimately divided on the
380 basis of twenty-five and fifty-five acres. I am inquiring of this witness how that came about; how that basis of division was reached.

The COURT: Don't this correspondence disclose?

Mr. BIDDISON: No, sir.

Judge DALE: It would, if we could get the letters from Mr. Drown and Mr. Wagg, but we have been unable to procure those.

Mr. BIDDISON: The correspondence don't have to deal with the witness's and Mrs. Herbert's discussion on that point. He says he had been discussing it with her during this time.

Mr. WRIGHTSMAN: And that it was not in writing.

Mr. CLARK: If the witness made any agreement with Mrs. Herbert, then he should tell what that agreement is. Counsel is assuming that that agreement had something to do with the twenty-five dollars an acre—or with the twenty-five acres.

The COURT: The correspondence shows that Wagg and Drown were in correspondence, and that Wagg and Mrs. Herbert were in corespondence. That Wagg, in his correspondence to Drown, direct-him to do certain things; and his correspondence to Mrs. Herbert shows certain propositions that he was making on his own behalf, of the division of the land, and an extension of time for the payment of the loan. A number of extensions were made by correspondence with him direct. In one or two letters he directed her to take the matter up with this witness, and see what arrangements could be made with him. I don't remember which ones they were now. And if it was in pursuance of the authority of Wagg that he entered into an agreement, it would be immaterial, unless it was the one that he transmitted to Wagg, and that was executed in some manner. Simply conversations that they might have had, which were not
381 communicated to Wagg, and which were not carried into execution afterwards, would probably not be very material in determining the issues in this case. Now, as I understand you, what you are seeking by this question is only the fact of who suggested a division of the land?

Mr. BIDDISON: No, no. The proposition has already been shown as to who suggested the division of the land. What I want now is who sugested the division into twenty-five and fifty-two acres. The first suggestion was an equal division, by Mrs. Herbert. And now I want to know how they reached the change from that proposition down to twenty-five acres and fifty-five acres; how that came about.

The COURT: Well, the correspondence discloses that. The correspondence shows that there were negotiations back and forth as to the land. He suggested at one time giving her twenty, and the-suggested giving her fifteen, and suggested giving her ten, and one letter he got down as low as five; five to fifteen, I believe he said, and then referred the matter to Drown, to ascertain what amount of land could be set aside to her, covering her house, and inclosing her house, so as not to take that from her, and on that, I think, as well as I recollect it now, he directed her to take that up with Drown. Possibiy that may be the matter referred to here.

Mr. **Biddison**: I want to show by the witness that he took the matter up with her; that they were discussing that matter, and reached a compromise, which he transmitted to Wagg, or that was transmitted to him some way.

Mr. **Clark**: If he transmitted it, he did it in writing.

Mr. **Biddison**: I am not to the transmission proposition yet. I am taking up the matter in its preliminary stages, to show
382 that he did take that matter up and discuss it with her, and that she, in the way of a compromise, agreed to this division.

Mr. **Wrightsman**: The point of showing pressure, or oppression, as she termed it.

Mr. **Biddison**: Whether or not it was a deal between the parties.

The **Court**: Well, his conversation with her, if that is as far as it goes, would be competent. Her statements to him would be competent, if it related to this matter. As to the agreement or what the agreement was, I assume it is embraced in the correspondence. It would necessarily have to be.

Mr. **Biddison**: I am not taking up the matter of the final agreement at all.

The **Court**: Read the question.

Thereupon the question was read by the stenographer.

The **Court**: I sustain the objection to that question.

Mr. **Biddison**: Exception.

Mr. **Biddison**:

Q. Did you have any conversation with Mrs. Herbert upon the basis upon which this land should be divided, how it should be divided?

A. I had several conversations with her.

Q. You may state what she said upon that subject, one time and another.

A. She wished me to use my influence with Mr. Wagg, to get him to accept forty acres, the north forty, or the east forty; made both propositions. Of course, as the correspondence shows, Mr. Wagg wished to deed her ten acres——

Mr. **Clark**: Wait a minute. I object to his reciting the correspondence.

383 Mr. **Biddison**:

Q. Did you have any discussion with her, as to what Wagg wanted?

A. We did.

Q. What was said upon that subject between you?

A. I told her that I would do all that I could, everything I could with Mr. Wagg to get a fair settlement, what I considered a fair settlement, on the division of the land.

Q. You were engaged in business at Cleveland at that time?

A. I was.

Q. With her?

A. Yes sir, I was engaged in business with Mrs. Herbert and her niece, in the millinery business, in Cleveland, there at that time.

Judge **Dale**: What is that?

A. I say I was engaged in the millinery business with Mrs. Herbert and her niece in Cleveland at that time; possibly a month or two later than that. It was in the spring or early summer of that year that we started the business there.

Mr. **Biddison**:

Q. They were running the business, were they?
A. They were in charge of the business, running the business.
Q. What business were you devoting your attention to?
A. Mercantile business, and we were buying hogs and corn that spring, Mr. Inge and I.
Q. How long after this settlement were you so engaged with her and her niece in business?

Judge **Dale**: I object to that.
The **Court**: Objection sustained.

Mr. **Biddison**:

Q. Do you recollect the occurrence of taking her deed to this fifty-five acres?
A. I witnessed the deed to the fifty-five acres.
384 Did you take the deed and transmit it to Mr. Wagg, or how was it sent?
A. I forget whether I transmitted the deed to Mr. Wagg or to the recorder. I turned over the release from Mr. Wagg of the mortgage and his deed to her of the twenty-five acres.
Q. Now, you may state what was said and done there at that time, between yourself and Mrs. Herbert—First, did you act at that time on behalf of Mr. Wagg?
A. I acted on behalf of both parties.

Judge **Dale**: I object to that as immaterial, and stating a conclusion.
The **Court**: Objection sustained. Let him tell what he did, and the court will determine who he acted for.

Mr. **Biddison**:

Q. State what the transaction was at that time, all that occurred.
A. The deed had been sent down to me for her signature in March. I think it was dated the 20th of March, and I had told Mrs. Herbert, or sent word to her, that the deed was there——

Mr. **Clark**: Wait a minute. If he sent word.
The **Court**: Oh, that is too technical to take up the time.
Mr. **Clark**: I want to know who was mixed up in it.
The **Court**: Oh, go on.

A. She did not call for the deed. Mr. Wagg advised me, later to return the deed if it——

Mr. **Clark**: Wait a minute.
Mr. **Biddison**: That letter is in evidence, if the court please.

Judge **Dale**: Oh, yes.

A. And I returned it. And she saw me in May and said that ing to a misunderstanding on her part, she had failed to call and n the deed before, and asked me if I would please get Mr. Wagg return the deed for signing.

5 Mr. **Biddison**:

Q. Did you get it returned?

A. I did.

Q. Now, what happened after that?

A. And in getting it returned, I explained what Mrs. Herbert had ld me in regard to her belief——

Mr. **Clark**: Wait a minute.

The **Court**: You are being asked your conversation with Mrs. erbert, and not with Mr. Wagg. Your letters will show that.

Mr. **Biddison**:

Q. When you got it back from Mr. Wagg, what transpired?

A. I went out with Mr. Gilbert to her house——

Q. Mr. Gilbert is a notary?

A. Yes sir. And she signed and acknowledged the deed, and it s witnessed by Miss Synder, her niece, and myself. And there s a statement that she desired to make at that time to Mr. Wagg or e, covering, in part, the understanding, or basis of exchange of eds.

Q. Was there any objections made at that time to the execution of e instrument in any way?

A. The execution of the deed?

Q. Yes.

A. None whatever.

Q. Up to that time, was there any complaint that she was not tting a proper proportion of the land?

Judge **Dale**: Objected to as incompetent, and calling for a conusion of the witness.

The **Court**: Objection overruled.

Judge **Dale**: Save an exception.

86 A. There was no complaint. She told me in one conversation, at her home, that Mr. Sloan had offered her fourteen undred dollars for fifty-five acres of the land; and she told me at nother time that Mr. Deem had offered her fourteen hundred and fty dollars for fifty-five acres of the land, and she said in that same nversation that Mr. Wagg estimated the amount of his principal nd interest and taxes at about thirteen hundred dollars, and she ys, "I believe, as near as I can tell, that is correct." And she id, furthermore that Mr. Wagg had had a good deal of worry and ouble over the land, and that he was offering her practically as uch as Mr. Sloan or Mr. Deem did. And in connection with Mr. eem's offer, she said she believed it was Jim Martin that wanted he land, instead of Mr. Deem, and she didn't want Jim to have it,

on account of some trouble that Mr. Martin and Mr. Herbert had had, and said that she preferred that Mr. Wagg should have it.

Mr. Biddison:

Q. At the time of the execution of the deed, did she execute any other instrument?

A. She executed a statement to Mr. Wagg, written in her own handwriting. Mr. Wagg had asked me to get a statement, incorporating the statements she had made in regard to her belief that Mr. Herbert was dead, and that she would procure his signature to the deed, should he return; and she made the statement in her own writing, and affirmed to it, that she did believe him to be dead——

Mr. Clark: Wait a minute. I object to his reciting that.

A. That is a part of the papers, I believe. At least, she executed that statement.

387 Mr. Biddison:

Q. That is the same statement that has been introduced in evidence, as a letter addressed to Mr. Wagg, and headed with the venue, by the notary, and his jurat attached to it?

A. Yes, sir, I presume so. I have not seen that.

Q. That was the way it was done, was it not?

A. Yes sir.

Q. Was there any other conversation, than what you have related occurred there at that time?

A. None that I recollect.

Q. Up to that time, had you entered into any arrangement with Mr. Wagg, whereby you was to purchase an interest, or had purchased an interest in that land?

Mr. Clark: Wait a minute. I submit that must be a part of the correspondence that he is calling for.

Mr. Wrightsman: Mr. Wagg was down there in person part of the time?

The Court: Objection sustained.

Mr. Biddison: Exception.

Mr. Biddison:

Q. Had you, at that time, purchased any interest in the land?

A. No sir.

Q. When did you—I believe you said you did not know what you had done with that deed. Did you advise Mr. Wagg of the fact that you had the deed?

Mr. Clark: Wait a minute. I submit that calls for the contents of a communication.

The Court: Objection sustained.

Mr. Biddison: Exception.

Mr. Biddison:

Q. What did you do with that letter, the affidavit letter, that was taken there at that time, if anything?

A. I mailed it to Mr. Wagg.

88 Q. Was it in response to your mailing that to Mr. Wagg that you received these letters, which have been introduced n evidence, with reference to your not taking a proper statement?

A. Yes sir.

Q. Now, state what transpired subsequent to that time, after you ansmitted this.

A. He had his lawyer prepare a statement, comprehending the isis of the settlement——

Mr. **Clark**: Wait a minute. I submit that that is a part of the rrespondence.

The **Court**: What did you do, is all they want to know.

A. I showed the statement to Mrs. Herbert, took it over to the milnery store and showed it to her there, and told her to take the stateent and look it over, and see if that was what she wanted to sign, nd if it corresponded with the representations that she had made, n which the exchange of deeds was made; and I also explained to er that the former statement had not been satisfactory to Mr. Wagg, nd that I was sorry it had not, as he had trusted the business to me, nd that I should be sorry to displease him in connection with carryg out the business and told her that if she found out that the stateent was what she had alleged, I would be glad to have her sign it. nd, as near as I recollect, after a week or ten days she told me that e had given the matter considerable thought, and that there were e or two changes that she would like to have made, and after which e felt as though she could sign it. And I told her to suggest the anges she wished, and she did so, and I wrote out the agreement hich has been submitted here, the statement as she wished. She rther said, and emphasized it quite strongly, that she was very much averse to having the public prying into her personal

89 matters, and especially anything pertaining to Mr. Herbert's absence; she was very anxious that there should be nothing f that kind put in tne records. And I told her that I would agree hold this affidavit in trust both for her and Mr. Wagg, in the bank, r in my papers, to be surrendered to Mr. Wagg only in the event at it should be necessary to perfect the title to this land, or to make sale of the land, and I would protect her as far as I possibly could the matter. And under those circumstances she signed the affidait, and I think I gave her the receipt for it which has been subitted.

Mr. **Biddison**:

Q. At that time, did you suggest any defects in her title to the enty-five acres?

A. None whatever.

Q. Did you suggest to her, or threaten her with loss of her twentye acres of land?

A. Not at all.

Q. At that time, did she say anything to you with reference to the ct that she thought that she had not been fairly dealt with, or anying of that character?

A. She was entirely satisfied, had no objection to make——

Judge DALE: Wait a moment. We object to the statement, as not responsive to the question, and not called for.

The COURT: Objection sustained.

Mr. BIDDISON:

Q. Just answer the question direct.

A. I think she told me——

Mr. CLARK: Wait a minute. There is a direct question.

A. What is the question?

Mr. BIDDISON:

Q. At that time that she signed this second affidavit, in July, I think July 6th, 1901, did she make any complaint to you, or say anything to you to the effect that she had been unfairly dealt with? 390

Judge DALE: Objected to as incompetent, and calling for a conclusion. Let the witness state what was said in that conversation.

The COURT: Well, that practically calls for it.

Judge DALE: I object to counsel's method of calling for these conclusions.

Mr. BIDDISON: I will ask for what was said, as quick as I find out that there was anything said.

The COURT: There might have been a lot said that was incompetent. He has directed his attention to the particular matter.

A. I told her that the matter——

The COURT: Wait. That is not the question that was asked you.

A. There was something said.

Mr. BIDDISON: What was said at that time, now, with reference to that matter?

A. You refer to the time the statement was given?

Q. Yes.

A. There was nothing said at that time.

Q. Had there been prior to that time?

A. Yes.

Q. When?

A. After the exchange of the deeds.

Q. How long after?

A. Why, possibly a few days.

Q. Where did that conversation occur?

A. I don't remember whether it was in—I think it was in the millinery store there.

391 Q. You may state what was said on that subject at that time.

A. I told her that I was glad I had been able to get the matter settled up, and that she had her land and her home, and nothing to worry about, and she says, "Yes, but" she says, "I have always felt as though forty acres of that land belonged to Mr. Wagg, and forty acres should have been mine."

Q. Was that all that she said?

A. That was all.

Q. When, after that, was the first complaint, or suggestion from her, along that line, that you ever heard?

A. After we had rumors that Mr. Herbert was living.

Q. About when was that?

A. I think in October or November, 1901, possibly, or 1902. I am not positive as to the time. I think in 1901, the fall or winter.

Q. Now, what did she say to you at that time?

A. She came in the bank, and asked me for that affidavit that she had made.

Q. What did she say with reference to that affidavit?

A. She said the matter was all settled up now, and she didn't think there would ever be any trouble about it, but she was afraid I might die, or something, and somebody else get hold of that affidavit; and she wanted it, she said. She said there would never be any trouble.

Q. Did you turn it over to her?

A. I did not. I told her I held it in trust for her and Mr. Wagg; I had refused to turn it over to him, and I couldn't turn it over to her, in justice to Mr. Wagg.

Q. Any further conversation at that time?

A. No, she went out. She staid around a minute or two, and thought about it, and went out.

392 Q. Now, can you fix whether that was in 1901 or 1902?

A. Not positively.

Q. Well, can you, by referring to the time when you heard rumors of Mr. Herbert coming back. Do you know when those rumors first——

A. About his being alive?

Q. Yes.

A. I think in the fall of 1901; I am not positive.

Q. You caused the platting of that addition?

A. I did.

Q. When was it platted?

A. The surveying was done in August, and the plat was recorded I think, in September.

Mr. **Wrightsman**:

Q. What year?

A. 1901.

Mr. **Biddison**:

Q. Did you proceed to sell lots?

A. I sold when I could find a buyer; on contracts, principally.

Q. Now, about when did you sell your first lot?

Mr. **Clark**: Wait a minute. I suppose the contract would show.

A. October, 1901. I have the record there, the book showing the sales of lots. About the 18th of October.

Mr. **Biddison**:

Q. Did those lots sell rapidly, or otherwise, when they were first put on the market?

Judge Dale: Objected to as incompetent. He says he has a record of it.

The Court: He may answer the question.

A. Lots sold until along in October, about the middle of October, I think.

Mr. Biddison:

Q. Then about how rapidly did they sell from that time on?

393 A. Well, I sold lots occasionally right along, on contracts, and for cash.

Q. How long contracts were they? Well, I will not ask that at this time. Do you know how many lots you sold in the year 1901, before New Years?

A. No sir.

Judge Dale: I object to that. He has got a record of it. I don't see how that is competent.

The Court: Well, his record is his own record, that he is talking about; a memorandum for his own information; it don't bind anybody.

Judge Dale: It will not bind us on cross-examination, I don't suppose.

The Court: If it was a material matter, it might.

Judge Dale: I suppose they executed contracts or something; written agreements, or something.

The Court: Well, we are not going into that question in this case, as to what property they have sold, and what money they have received, that is, in this phase of it now. I assume that the only purpose of this evidence is simply going to the prospective value; that is, offering evidence to show that there would have been, or might have been a prospective demand for property for townsite purposes; and I presume they are offering this simply to show what, in fact, did occur afterwards, as meeting a prospective condition; but not for the purpose of showing actual sales, or money received. For that purpose, he can answer the question.

Mr. Biddison:

Q. About how rapidly did those lots sell there in the year 1901, the fall and winter of 1901?

A. Oh, I sold a few lots each month.

394 Q. Have you any recollection as to how many?

A. There were some choice lots sold out at first there. I should judge I sold probably in the year 1901, forty or fifty lots.

Q. Do you know about what prices you got for them?

A. Yes sir. I sold lots from twenty-five and twenty-six dollars down to ten or eleven dollars.

Q. What was the highest price you got for any of those lots?

A. In the year 1901?

Q. Yes.

A. I should judge twenty-five dollars was the highest price; that is my recollection.

The **Court**: Just suspend now, until after dinner.

Thereupon Court adjourned until 1:30 o'clock P. M.

At 1:30 o'clock P. M., the hour to which an adjournment was taken, court convened pursuant to adjournment, all parties being present as heretofore noted, and thereupon the following proceedings were had and done, to wit:

L. M. **Drown** thereupon resumed the stand, and his examination was continued as follows, to wit:

Mr. **Biddison**:

Q. Do you recollect the occurrence of receiving a letter from Mr. Wagg, in which he offered you an interest in this Herbert tract of land?
A. Yes sir, in the fifty-five acres.
Q. When was that?

Judge **Dale**: Objected to as not the best evidence.

A. February, 1901.

395 Mr. **Biddison**:

Q. When was it, with reference to the time that you had the conversation with Mrs. Herbert regarding his letter to her that he had sold you a half interest?
A. Before I had the conversation with her.
Q. That is the letter referred to, the letter in which he——

Judge **Dale**: I object to that. The letter is the best evidence.
Mr. **Biddison**: Well, the letter is in evidence.
The **Court**: Proceed: Finish your question, and I will determine the matter.

Mr. **Biddison**:

Q. Is that letter the letter in which he stated he enclosed you a contract.
A. Yes sir.
Q. Did you sign that contract?

Judge **Dale**: We object to that. We have asked for that contract, and they have failed to give it to us. We insist they have no right to offer it in evidence.
Mr. **Biddison**: We are not going to offer it in evidence.
The **Court**: What are you going to do with it?
Mr. **Biddison**: I want to show it was not executed. They have offered in evidence a letter showing that he sent a contract down there, and I want to show Mr. Drown did not accept the contract, didn't sign the contract.
The **Court**: You mean a contract between Wagg and Drown?
Mr. **Biddison**: Yes.
The **Court**: Oh, that is not in this case. We are not trying that question. That is purely incidental.

Mr. Biddison:

Q. At what time did it become generally known in Cleveland that a railroad was coming through there?
A. About the middle of May, 1902.

Mr. Biddison: You may cross-examine.

396 Cross-examination by Mr. Clark:

Q. Mr. Drown, you say at the beginning of making—At the time of making this loan, you had nothing to do with the transaction?
A. No sir.
Q. You wrote a letter concerning the values of this property to Mr. Wagg, did you not, at that time?
A. I so stated this morning.
Q. What business were you engaged in at that time?
A. Mercantile.
Q. Did you afterwards take a position in a bank?
A. Yes, sir, in August, 1901.
Q. In August, 1901?
A. Yes sir.
Q. Now, you sent the telegram referred to to Mr. Wagg?
A. Yes sir.
Q. You had several letters from him concerning the payment of this interest immediately preceding that, did you not?
A. I don't recollect, I think not.
Q. I will ask you if you remember hearing read on yesterday, and remember the occurrence that you received, a letter written from him October 25th—Did you write a letter to him on October 25th, 1899, telling him that for some reason Mr. Herbert had failed to come in with the interest, and that you saw him that morning, and asked him about it, and he said he had been looking for the money the last two weeks, but it had failed to come. Do you remember that letter?
A. I remember the letter being read in evidence, yes.
Q. Do you remember writing that letter?
A. I can't say that I remember writing that letter.
397 Q. You don't remember having anything to do with the collection of that interest?
A. I didn't collect it.
Q. Didn't you write Mr. Wagg a letter on October 6, 1899, in which you said Dr. Herbert was in this morning, and said he would be ready with the interest. Do you remember that letter?
A. No, I don't remember it.
Q. Don't remember any such correspondence had by you?
A. I remember there was some correspondence.
Q. Do you remember hearing read yesterday the letter bearing date October 25, 1899, in which it is recited by Mr. Herbert in his letter to Mr. Wagg, "I received an order from you to pay Mr. L. M. Drown one hundred dollars due as interest." Do you remember knowing anything about receiving such an order to collect that interest?

A. I may have; I don't remember.

Q. You have no recollecetion upon that subject whatever. Do you remember writing a letter to Mr. Wagg that was read in evidence on yesterday, bearing date October 28, 1899, in which you enclosed him a letter from Mr. Herbert, relative to interest due?

A. I don't remembeer.

Q. You have no recolleection of that letter?

A. The letters are there.

Q. I am talking about your recollection. Do you have any recollection of receiving from Mr. Wagg the letter bearing date November 13, 1899, acknowledging receipt of your telegram, and stating that he enclosed a power of attorney on the whole mortgage matter?

A. I remember the letter, yes sir.
398 Q. Do you remember getting the power of attorney.
A. Yes sir; the power of attorney was to pay the taxes.

Q. I didn't ask you what the power of attorney was for, but what did you do with the power of attorney?

A. I paid the taxes.

Q. I didn't ask you what you done under the power of attorney, but the paper itself.

A. I don't know.

Q. When did you see it last?

A. I don't know.

Q. Were you in the bank at that time?

A. No sir.

Q. You were in the mercantile business at that time?

A. Yes sir.

Q. What did you do with that power of attorney when you got it?

A. I don't know; I paid the taxes.

Q. I ain't asking you what you done under it. I asked you what you done with the paper.

A. I don't know.

Q. Do you remember ever having seen it after you got it?

A. I used it long enough to carry out Mr. Wagg's request.

Q. Well, I say do you remember now of ever having read that order, or seen it, since you got it?

A. Certainly, I read it when I got it.

Q. When did you last see it?

A. When I used it.

Q. You haven't seen it since that?

A. Not that I know of.
399 Q. You don't know what you did with it?
A. I didn't preserve it, no sir.

Q. You undertook to execute the trust imposed at that time?

A. I paid the taxes.

Q. Do you remember receiving the letter that enclosed that power of attorney?

A. No, not particularly.

Q. Did you execute the power of trust referred to in the letter which has been read in evidence?

Mr. Biddison: Objected to as calling for a conclusion, and not asking for the fact.
The Court: Overruled.
Mr. Biddison: Exception.

A. Did I do what?

Mr. Clark:

Q. Did you comply with his request, so far as it was in your ability to do so?
A. Yes sir, I paid the taxes.
Q. In addition to the instructions—In addition to whatever it may have said about taxes, the letter that you received in connection with that, which letter refers to your having a power of attorney on the whole mortgage matter, do you not remember that the letter also instructed you to record the deed at once, and forward to the Register of Deeds by registered mail?

Mr. Biddison: Objected to as immaterial. The correspondence is admitted in evidence. His remembrance of it would be immaterial for any purpose.
The Court: Well, I don't know whether it would or not. He can answer the question.
Mr. Biddison: Exception.

A. I didn't record the deed. I don't think the deed—it was not turned over to me at all.

400 Mr. Clark:

Q. Did you have it sent to the Register of Deeds, under that instruction?
A. It was sent direct by Mr. Litten. I had nothing to do with the deed.
Q. Did you request it being sent?
A. I think not.
Q. Don't think you had anything to do about that?
A. I think not.
Q. Did you carry out the trust imposed in that letter, directing you to take no chances, trust no one, tell no one anything until all is fixed; do you remember that instruction?

Mr. Biddison: We object to that, because that is no trust imposed upon him to carry out.
The Court: Objection sustained. That is simply an admonition.
Mr. Clark: I want to know whether he executed it.
The Court: Well, it is immaterial.

Mr. Clark:

Q. Mr. Drown, I will ask you if it is not a fact, that under the various letters so received from Mr. Wagg, if you were not attempting to carry out those instructions with him, during the time you were holding this confidential—giving confidential advice to Mrs. Herbert in reference to a division of this land, and consulting Mr. Wagg a portion of it?

Mr. **Biddison**: Objected to as immaterial, his attempt to carry out those instructions.

Mr. **Wrightsman**: And also as involving several distinct and separate propositions.

The **Court**: Objection overruled. Answer the question.

401 A. Yes, I was doing what I could to accommodate Mr. Wagg, and get the matter settled up.

**Mr. Clark**:

Q. To comply with his request. Do you remember the circumstance of receiving the letter bearing date February 17, 1900, to you, in which he instructs you, "You are hereby authorized to act as my agent in looking after my lands and tenants on the Herbert property at Cleveland. Collect rents monthly. Sell the hay crop standing, if possible, and report to me at once in three months, and keep me advised of any changes of interest from time to time." Do you remember getting that letter?

A. I believe I do.

Q. Do you remember trying to execute it, according to instructions?

A. No sir, I never collected any rent.

Q. What about the hay?

A. I didn't sell it standing.

Q. Didn't you try to carry out the instructions, telling you to sell the hay standing, if possible?

A. No sir.

Q. Paid no attention to that?

A. No sir.

Q. That letter bears date February 17th?

A. Yes sir.

Q. It was quite a time before the actual time for selling it, wasn't it?

A. Yes sir. Mr. Wagg was down, after that, personally.

Q. Now, you say you didn't write any letters to Mr. Wagg during this time, in answer to any of those letters?

A. You have some of my letters there.

402 Q. Do you say that is all the letters you wrote to him?

A. I don't know whether it is or not.

Q. Did you keep any copy book?

A. No sir. We may have kept one for our business correspondence; store correspondence.

Q. Have you got in your possession none of the correspondence between yourself and Mr. Wagg, other than that that has been referred to and read in evidence?

A. That is all I have.

Q. You haven't seen any of it?

A. No sir. I have been in the habit of cleaning up my correspondence occasionally, and destroying letters that I had no further use for.

Q. Do you say that your correspondence was destroyed that way, or do you give that as a reason why those letters are not here?

Mr. Biddison: Objected to as improper cross examination.
The Court: Overruled.
Mr. Biddison: Exception.

A. Yes sir.

Mr. Clark:

Q. You were served with a subpœna *duces tecum,* to bring all the correspondence between you and Mr. Wagg to court, were you not?
A. I think I was.
Q. Did you make search to find it?
A. I did.
Q. Have you brought to the court, and turned in to counsel on the other side all that you found?
A. I did.

Mr. Biddison: Wait a minute. He has not been called upon to submit any to counsel on the other side yet. He is our witness now.

403 Mr. Clark:

Q. I will ask you if you have any others?
A. No sir, I have not.
Q. I will ask you if you have turned over to your counsel any other?
A. What he has turned over to you.
Q. And none other?
A. That is all. You have copies of all the letters I received from Mr. Wagg, anyway.
Q. I am not talking about the letters you received from Mr. Wagg. I am talking about the letters you wrote to Mr. Wagg.
A. How would I have them?
Q. You say they are all here?
A. Copies are here.
Q. They were not furnished by you, were they?
A. They couldn't be.
Q. Now, under his letter of December 24, 1900, to Mrs. Herbert, in which he instructed her to talk over with Mr. L. M. Drown and have him write me, do you remember consulting her, and her showing you this letter?
A. I don't remember what it was in regard to.
Q. The letter of December 24, 1900, in which Mr. Wagg wrote to Mrs. Herbert, among other things that: "Under our agreement it is all now conveyed to me, yet I shall not use any rights I may have harshly, but shall deed to you and your boys a piece of the land, preferably on which the house is located, so you may still live

there, and have land to cultivate for your support. You talk it over with Mr. L. M. Drown, and have him write me." Did she talk it over with you?

A. Yes sir, she did.

404 Q. And did you write him?

A. I suppose I did.

Q. Do you know anything about what became of that letter?

A. No sir.

Q. Do you remember the circumstances of getting a letter from him written May 12, 1901, instructing you to the effect: "Dear Roy: Before surrendering mortgage lease & note to Mrs. Herbert, please learn from a reliable lawyer, after explaining to him the transaction & conditions fully, whether or not the mortgage ought to be foreclosed to be strictly & fully legal." Do you remember getting that letter?

A. I think so.

Q. Do you remember consulting with a lawyer?

A. I think I spoke to three or four attorneys, lawyers.

Q. Who were they?

A. Well, I don't recollect now. I think I spoke to Mr. Williams, H. W.; I think he was down there. I don't remember whether I spoke to anyone else or not, Mr. Clark.

Q. You carried out his instructions in all those letters just as closely as you were able to?

A. I tried to, yes sir.

Q. Now, I will call your attention, Roy, to a letter you received—I will ask you if you received from Mr. Wagg the letter, the copy of which was read in evidence, bearing date October 5, 1900: "My Dear Roy", first containing other matters; now on the Herbert matter, or in reference to the Herbert matter; "On the Herbert matter go slow until Nov. 1st. After that time we will make a deal with interest at figure named by you & I will go ½ with you if you desire it, provided no buyer is found". Marked at the top, "Personal, Confidential"; now, do you remember getting that letter?

405 A. I suppose I got it.

Q. Well, do you recollect anything about it?

A. I don't recollect.

Q. Mere matter of supposition, is it?

A. I think I received the letter.

Q. Do you remember having named some figure to him?

A. I don't know exactly what he refers to there.

Q. You don't know.

A. Not exactly, no sir.

Q. Well, do you have any general idea?

A. What is the date of the letter?

Q. October 5th, 1900. "Figures named by you."

A. I don't know what he refers to.

Mr. Biddison: I suggest that the witness be permitted to examine the letter.

The Court: It is not necessary, if counsel reads it to him. It answers the same purpose.

Mr. Wrightsman: He is not reading all of it.

Mr. CLARK:

Q. "On the Herbert matter go slow until Nov. 1st; after that ti we will make a deal with interest at figures named by you, and will go ½ with you if you desire it."

A. Yes sir, I remember receiving the letter.

Q. Now what were those figures that you named, and that he a cepted in that letter?

Mr. BIDDISON: Objected to as not proper cross-examination, irr evant and immaterial.

The COURT: Overruled.

Mr. BIDDISON: Exception.

A. In trying to induce him to accept a part of the land, I had offer to take an interest with him, in case he and Mrs. Herbert ma a deal of that kind.

406 Q. What were the figures?

A. I offered him seven hundred dollars for a half intere in the fifty-five acres, in the event the settlement was made.

Q. You made those figures to him?

A. I think I must have.

Q. You think you must have?

A. I think I must have, yes sir: I am not positive.

Q. Did you answer this letter?

A. I don't know whether I did or not. I suppose I did. I ge erally answer my letters.

Q. Did you ever hear anything from it?

A. Why, you have the correspondence there, later, in regard the matter.

Q. Referring to those same figures made by you?

A. I don't know. I suppose that is the matter referred to.

Q. He sent you a contract, after that, to sign up, didn't he?

A. He did.

Q. Do you know where that is?

A. No sir, I do not.

Q. Don't know anything about what became of it?

A. No sir, I do not.

Q. When did you see it last?

A. Well, I think—I don't remember when I saw it last, Mr. Clar I paid him the money.

Q. Well, in this same letter in which he agrees to take the figur named by you, and deed you one-half of it, and stating furthe Remember all the increase in value don't belong to Mrs. H. It my land now."

A. She got her share of it.

407 Q. Did you make any reply to that letter?

A. I don't remember.

Q. Don't remember to have ever done so?

A. No sir. I may have done so; and probably did; I answer mo of my letters.

Q. Did you take this letter down and show it to Mrs. Herbert?

Mr. **Wrightsman**: Objected to as incompetent,irrelevant and immaterial.

Judge **Dale**: It is a fact. He claims to have been acting as a friend to both parties.

The **Court**: He was under no obligations to show her the letter.

Judge **Dale**: Did he make known to her the facts in the letter?

The **Court**: That is another proposition.

Mr. **Wrightsman**: That is not the tenor of his proposition by any means.

Mr. **Clark**:

Q. Did you communicate to her the facts contained in this letter?

A. I don't remember. I talked with her frequently.

Q. Did you tell her he had made a proposition to you to take half of it?

A. No sir, I don't think that I did. I don't remember telling her at the time. She knew later.

Q. Did you tell her that Mr. Wagg had either offered you, or that you had offered to take half of it, at given figures?

A. I don't think that I did.

Q. Did you tell her that you was figuring at all, either furnishing figures to him, or he was furnishing figures to you, to take an interest in that land?

A. I don't think that I did. I may have done so. I don't remember.

408 Q. Now the conversations you had with her was as a friend of hers?

A. Yes sir.

Q. She was a friend of you and your family?

A. Yes sir.

Q. Your father is a minister, is he not?

Mr. **Wrightsman**: Objected to as immaterial.

Mr. **Clark**:

Q. And she was a member of his church?

A. No sir, not at all; never was.

Q. Well, she was at that time considered by you as a close friend to the family was she not?

A. We were about the only friends she had at that time as near as I remember.

Q. And that was the reason she went to you and advised and counseled with you?

A. That was the reason she asked me to ask Mr. Wagg to take a part of the land in settlement of that mortgage.

Q. And it was carrying out that confidence of hers that she had these conversations with you, and told you of the deal she was making with Drown—with Sloan?

A. She told me, as I testified this morning, that Mr. Sloan—

Q. And Deem?

A. Yes sir. And told me she preferred to have Mr. Wagg have the land——

Q. Did you communicate——

Mr. WRIGHTSMAN: Wait a minute. Let him answer the questio
A. What was it?

Mr. CLARK:

Q. Mr. Wrightsman thinks you have got some more to tell.
A. I told you that I did. That she told me of the offers that M
Deem and Mr. Sloan had made her; and she told me that s
409 preferred to make a settlement with Mr. Wagg, as the amou
was practically the same, and Mr. Wagg had bothered ar
worried; and she said she thought that Jim Martin was figuri
through Mr. Deem for the land.
Q. This is just repeating what you testified to before.
A. Well, you asked me the same questions.
Q. What I want to know is whether or not you told her, and
not, why you didn't tell her that you were furnishing figures
Wagg as to the value of the property?

Mr. BIDDISON: Objected to as a repetition, so far as the fact of h
not telling her. The question of why he did not, is immaterial.
Judge DALE: We don't think so. He says he was her confidenti
friend in this matter.
A. I was.
Judge DALE: That is what he claims, and here is a letter fro
Mr. Wagg to him, which shown he was acting directly against h
interest.
Mr. BIDDISON: That is a matter of argument.
A. The letter shows I was sincere in advising Mr. Wagg to acce
a part of the land, because I offered to take an interest in it wi
him.

Judge DALE:

Q. Why didn't you tell her?

Mr. WRIGHTSMAN: Wait a minute. One at a time.

Mr. CLARK:

Q. Why didn't you tell her that Wagg was giving you a genero
offer for half of it?

Mr. BIDDISON: Objected to as assuming a fact not in evidence.
The COURT: Oh, yes.

Mr. CLARK:

Q. Why didn't you tell her you had offered to take an intere
in the place with Wagg?

410 Mr. BIDDISON: Objected to as immaterial.
The COURT: Overruled.

A. I didn't think it necessary. I didn't see anything——

Mr. CLARK:

Q. Why didn't you tell her that Wagg had offered you a ha
interest in it?

A. I didn't think it was necessary. I saw nothing to be gained by it. It was incompetent and immaterial.

Mr. Clark:

Q. And irrelevant?
A. Yes sir.
Q. Now, in this same letter, in which Mr. Wagg says: "Now there is a rise they whine and squirm & want all there is & talk about justice & charity."
A. What is the date of the letter, Mr. Clark?
Judge Dale: October 5, 1900. When you were having these negotiations.

Mr. Clark:

Q. Now, you understand that Mr. Wagg, at that time, only wanted his money back?
A. Yes, sir, October 5, 1900.
Q. What did you understand he meant, then, by the expression, "Now there is a rise they whine and squirm and want all there is in it."

Mr. Wrightsman: Objected to as immaterial, and irrelevant. It is immaterial what this man, or anybody else thought about what Mr. Wagg said.
Mr. Clark: He testified that he understood that Mr. Wagg only wanted his interest back, and now I ask him what he understood by this.
Mr. Wrightsman: Objected to as incompetent, irrelevant, and immaterial, and not proper cross examination.
411 The Court: Read that clause in the letter again.

Mr. Clark:

Q. "Now there is a rise they whine & squirm & want all there is & talk about justice and charity, when the original papers presented were defective with no doubt a plan to cheat me." Now, in reference to that clause, that I have just read,—you say that you understand that Mr. Wagg didn't want anything but his money; what did you understand by that clause?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Overruled.
Mr. Biddison: Exception.

A. He seems to think they expected to cheat him in the preparation of the papers; probably did.

Mr. Clark:

Q. If Mr. Wagg only wanted his money back, if there was a rise in the land, wasn't Mrs. Herbert entitled to all there was in it?
Mr. Wrightsman: Objected to as argumentative.
The Court: Objection sustained.

Mr. Clark:

Q. Did you understand him that he didn't want any of the rise in the land, other than his money back?

Mr. Biddison: Objected to as irrelevant and immaterial.

Mr. Wrightsman: And argumentative.

The Court: Overruled.

A. He gave her to the *the* first of January, there, to sell the land.

Mr. Clark:

Q. That is not the question I asked you.

Judge Dale: What you understood by that. That is what we want to know.

A. He offered her until the first of January to pay it.

Judge Dale:

Q. That is not the question at all. What did you think
412 Mr. Wagg meant?

Mr. Wrightsman: I object to two counsel propounding one question.

Mr. Clark: It will take three or four to get an answer to that one.

Judge Dale: He was acting as Mr. Wagg's agent.

A. Not at all.

The Court:

Q. The question submitted is what you understood by that clause in the letter of Wagg's instructions to you?

A. I fail to see any instructions there, Your Honor.

Q. Well, can you answer the question, then?

Mr. Clark:

Q. You say that Mrs. Herbert told you she thought that Wagg was out about thirteen hundred dollars?

A. Yes sir.

Q. And you thought so, too, did you?

A. I suppose so, yes sir.

Q. Well, there was just a thousand dollars due in October, 1899, wasn't there?

A. I never have looked into that part of it.

Q. You haven't?

A. No sir.

Q. You don't know that this is a mortgage, bearing date October, 1898, due in one year, interest from maturity, do you?

A. I think it was.

Q. Well, then, in October, 1899, there was just one thousand dollars due, the whole business, wasn't there?

Mr. Biddison: Objected to as argumentative, and not the best evidence.

Mr. Clark: I want to find out how he gets this thirteen hundred dollars.

A. I didn't get it.

Mr. Clark:

Q. You didn't get it?
413 A. No.
Q. You didn't figure on it with Mrs. Herbert?

A. No, I didn't figure with her.
Q. She told you that was about right, she thought?
A. She had Mr. Wagg's letter, and she said he said the debt vas about thirteen hundred, and she said she thought that was bout right.
Q. You didn't tell her any better; you are a friend of hers?
A. Certainly I was a friend of hers.
Q. You are the cashier now in the bank?

Mr. Wrightsman: Wait a minute.
The Court: Yes, Objection sustained.

A. Why should I figure it?

Mr. Clark:

Q. Why shouldn't you?
A. Why should I?
Q. Because you was a friend of hers.
A. She figured it herself. She is not illiterate.
Q. Didn't you, from the very statement of it, Mr. Drown, know, vithout figures, that by no possible computation could there be hirteen hundred dollars due on that mortgage?

Mr. Biddison: Objected to as irrelevant and immaterial.
The Court: Overruled.

A. Why, I didn't take that matter into consideration; the mount didn't interest me particularly.

Mr. Clark:

Q. I will ask you, Mr. Drown, at the time you secured that affilavit from Mrs. Herbert, if you did not at that time know, or have ood reason to believe that Mr. Herbert was alive?
A. No sir.
Q. I will ask you if you did not know of the fact of Mr. Miller aving seen him in Arkansas?
A. Not at that time.
14 Q. I will ask you if you did not know, as a matter of fact, at that time, of a rumor in circulation in Cleveland at that ime, that he had been seen in Arkansas?
A. I remember there was a rumor; I don't remember when the umor was first circulated, Mr. Clark.
Q. Don't you know it was in circulation at the time you got that ffidavit?
A. No sir, I do not.
Q. Will you say it was not?
A. I will say I don't remember whether it was or not; I don't hink it was at that time.
Q. If it was, you didn't tell her it was in circulation, did you?
A. Why should I tell her?
Q. That is the question.
The Court: Don't ask questions. Answer the questions he asks ou.
A. What is the question.

Mr. Clark:

Q. You didn't discuss the matter with her as to that rumor?

A. I told her that I heard Mr. Herbert was living—later.

Q. Did you tell her where you got that information?

A. I believe I did.

Q. You told her about Mr. Miller?

A. I don't know for sure.

Q. And in the light of that information, you say you talked the matter of securing that affidavit?

A. I think the affidavit was secured before that rumor was circulated.

Q. I will ask you if you don't know, as a matter of fact, Mr. Miller came into Cleveland, and circulated that report before that
415 affidavit was given, and if you do not know that she had failed to hear of it for a long time thereafter; don't you know that to be the fact, from the conversation?

Mr. Biddison: Objected to, as too complex.

Mr. Wrightsman: And incompetent, irrelevant and immaterial and not proper cross-examination.

The Court: Objection sustained.

Mr. Clark:

Q. When you received the deed for Mrs. Herbert to sign, and the contract for you to sign, and execute, with such specific instructions, duplicate copies, you say that you went ahead and got her to sign the deed, and sent it to him, without any comment from you upon the proposition that he had submitted?

A. The deed and the contract, I think, were not se-t to me in the same letter.

Q. You think not?

A. I think not; they may have been.

Q. Well, you are right positive in that recollection, are you?

A. No sir.

Q. You would not be so positive about it, on second thought. I will ask you if you do not know that they were all contained in the same communication, and that it was so read here on yesterday?

Mr. Biddison: Objected to as immaterial, his recollection about what was read here in court yesterday.

The Court: Overruled.

A. I don't remember whether they were enclosed in the same letter, or separate letters.

416 Mr. Clark:

Q. I will call your attention to a letter received by Mrs. Herbert from Mr. Wagg, written September 15, 1900, in which he says: "I am in receipt of a letter from L. M. Drown regarding answer to your last letter replying to mine of August 11th." Do you remember writing him a letter at that time?

A. No.

Q. Do you remember her taking this letter to you and consulting you: "You can go ahead and find a purchaser at $1300 for the east half and I will deed the other half jointly to your two boys giving you the first right to the income from same in the form of a life interest." Did you consult with her in reference to that letter?

A. I think she told me she had received the letter.

Q. Did she show you the letter?

A. I don't remember whether she showed it to me, or read it to me, or told me about it.

Q. Do you remember the transaction of his making that kind of an offer?

A. She told me she had received the offer.

Q. Did you understand at that time Mr. Wagg was not seeking to be the owner of that farm?

Mr. Biddison: Objected to as irrelevant and immaterial, his understanding of that transaction, and incompetent.

The Court: Overruled.

Mr. Biddison: Exception.

Mr. Clark:

Q. What do you say?

A. I don't think he claimed to be the owner of the farm, no sir.

Q. Now, then, I will ask you if you remember receiving a letter from Mr. Wagg dated January 29, 1901, and addressed "Dear Roy", in which he says——

A. That is four months after this.

417 Q. "I am at a loss what to do about the Herbert matter. I don't relish buying what I now own." Now, upon the receipt of that letter, did you understand that Mr. Wagg was claiming to be the owner of that land?

Mr. Biddison: Objected to as irrelevant and immaterial.

Mr. Wrightsman: And improper cross examination; and the letter speaks for itself, as the best evidence.

The Court: Objection sustained.

Judge Dale: Note an exception.

Mr. Clark:

Q. Did you communicate with her in reference to the contents of that letter?

A. Which letter?

Q. The one I just read from.

Q. You didn't read very much of it.

Q. Sir?

A. You didn't read much of it. I don't know what the letter was.

Q. Well, the letter containing that statement of his, that "I don't relish buying what I now own?

A. Is that all the letter?

Q. No sir. Did you communicate the fact expressed in that sentence, that Mr. Wagg didn't like the idea of paying for that which he already owned?

A. I don't suppose that I communicated that fact to her.

Q. Why didn't you do it, if you were advising her, and keeping her posted as a friend of hers, and representing her in communicating with Mr. Wagg?

A. I represented her in communicating with Mr. Wagg.

Q. Did you tell her that Mr. Wagg had said, that not to be hard, he thought of giving her ten acres?

A. I told her what he wrote me, and then wrote him what she thought ought to be done.

418 Q. Did you consult with her at all about it?

A. Why, certainly I did. I was reluctant to tell her about that amount, but told her, and then we succeeded in kind of splitting the difference there between what he thought she ought to have, and what she thought she ought to have.

Q. Who suggesed the idea of splitting the difference?

Mr. Biddison: Objected to, for the reason that counsel objected to my trying it out on direct examination, and therefore not proper cross examination.

The Court: Objection overruled.

Mr. Biddison: Exception.

A. I wrote Mr. Wagg that I thought that he could, in justice to himself, give her twenty-five acres, and that he would get his money out of the fifty-five acres.

Mr. Clark:

Q. Did you ever show her that letter after you wrote it?

A. No sir. Why should I?

Q. Did you get any answer to it?

A. I did.

Q. Did you get any other than those contained in these letters of instructions?

A. Not that I know of.

Q. You remember hearing the letter read on yesterday, in which he told you to tell her to give him that affidavit, and that you would not record it until you got his consent? Do you remember hearing that letter read?

A. I think you have got things mixed there.

Q. Until you got her consent?

A. What was the question?

Q. I asked you if you remembered the letter that was read yesterday, in which he told you to tell her you would hold that
419 affidavit until you could get his, Wagg's consent to give it up,
or to have it recorded, and that he would then fix the matter and put it on record.

Mr. Biddison: Objected to as assuming a fact not in evidence. That is not the letter, or the substance of it.

Mr. **Clark**:

Q. I will now call your attention to a letter written on February 20, 1901, by Mr. Wagg to you, addressed "My Dear Roy" in which he uses this language: "I quite agree with your plan to plat. It's the money making way, sure." Now what was the plan that you submitted to Wagg?

A. I suppose it must have been to plat the land.

Q. Did you tell Mrs. Herbert that you had submitted a plan to Mr. Wagg to plat the land, which was a money-making scheme, sure?

A. I don't know.

Q. You don't know?

A. No sir.

Q. What is your best judgment; do you think you did?

A. I don't know.

Q. Don't you know that you did not?

A. No, I don't remember whether I did, or not. I don't suppose I did, though.

Q. Now, in this letter in which he uses that language that I read, in addition thereto, the next sentence, reading them together; "I quite agree with your plan to plat. It's the money making way, sure. Will sell you the half interest with me. You to handle on a commission basis." Hadn't you at that time submitted to him a proposition to plat it, and sell it out in town lots, in a letter prior to February 20, 1901, three or four months before he got this deed? Had you submitted such a plan?

420 A. The deed was sent down in March for her signature.

Q. This was February 20th that he wrote?

A. Yes sir.

Q. And you wrote several days before that submitting the plan, hadn't you?

A. I suppose I had.

Q. Do you recollect anything about it?

A. No, I do not, Mr. Clark.

Q. Your mind is an absolute blank on that proposition?

A. I suppose I must have.

Q. Hadn't you submitted to him a proposition to buy a half interest in that eighty acres of land, prior to the letter of his of February 20, 1901?

A. You mean the fifty-five acres? You said eighty.

Judge **Dale**: Make it fifty-five acres.

A. I believe I told him if he would accept fifty-five acres of the land from her in settlement of the mortgage, that I would take a half interest with him, if they made that kind of a deal.

Mr. **Clark**:

Q. I will ask you if, in *that* same letters of his, the contents of your letter did not bring forth this statement: "5 lots per acre is good size & $100 per lot foots up high." didn't you submit those figures to him, that caused him to repeat them back to you?

Mr. Biddison: Objected to as irrelevant, and immaterial.
The Court: Overruled.

A. Not that I remember of.

Mr. Clark:

Q. Do you remember that you did not?
A. No. The plat shows three and a half lots to the acre. They were sold from eleven dollars to twenty-five dollars a lot.
421 Q. That ain't what I asked you. You have got a very vivid recollection about that?
A. Yes, that's money.

Q. But you haven't any recollection of the offer you made to Mr. Wagg?

A. Yes, I told him if he made the deal with Mrs. Herbert, and succeeded in closing the deal up for fifty-five acres, I would give him seven hundred dollars for a half interest.

Q. And plat it?
A. I suppose so.

Q. And five lots per acre are good size, and a hundred dollars a lot?

A. No, I don't think I ever got as wild as that, because you could buy lots on Main street for twenty-five dollars.

Q. Do you say you did not make that statement to him?
A. No, I don't think I did.
Q. You won't say you did not have that inference in this letter?
A. I don't say I did not; unless that was his own idea. That might have been his own idea about platting.

Q. Now, to refresh your recollection in reference—Do you remember his calling your attention in that letter to taking off the hay, and keeping a good sod?

A. I think one of the letters read yesterday stated that; I think it did. Anything wrong about that?

Q. Calling your attention to the fore part of this letter, Mr. Drown: "Yours of the 15th at hand & carefully noted. I appreciate your plan & will grant at least in part." Now what plan was that?

Mr. Wrightsman: I object to this piecemealing the letter.
Mr. Clark: I will read some more of it then.
422 The Court: Oh, no; he has got a right to ask about any part of it he wants to.

Mr. Wrightsman: Provided he asks all the connection with the subject-matter.

Mr. Clark: Read him the question.

Thereupon the question was read by the stenographer.

A. I don't remember.

Mr. Clark:

Q. Calling your attention, to further refresh your recollection "Run the line ten feet north of the house, and allow trees to be transplanted south. This squares up each lot. I quite agree with all you say of her." Do you remember what you said of her?

A. Yes, I told him she had the two children to support, and needed as much as twenty-five acres of land there.

Q. "And believe all you say of the old man."

A. Yes, I told him the old man was a rascal.

Q. Did you tell her that you entertained that opinion of him?

A. No. Why should I?

Q. When did you change your opinion of Mr. Herbert?

Mr. Wrightsman: Wait a minute. Objected to as assuming that he ever had a different opinion of Mr. Herbert.

The Court: Objection sustained.

Judge Dale: We withdraw that.

Mr. Clark:

Q. Now, calling your attention to the letter written to you by Mr. Wagg—written by you to Mr. Wagg, on November 23, 1901, in which you use this language: "In order to get that affidavit from Mrs. Herbert, I had to bind myself not to record it without first seeing her. You send me a statement that you will not record her affidavit without my consent and that will let me out. You will have no trouble getting my consent if it needs recording."

A. That is proper.

423 Q. Now, you were a friend of Mrs. Herbert?

A. Yes sir, I was.

Q. And represented yourself as a friend of her, telling Mr. Wagg what kind of a letter to write to you, in reference to recording it, that you might submit it to her, and get her consent to make the affidavit?

Mr. Biddison: Wait. To that we object as a misconstruction of the letter, and a misstatement of the contents of the letter.

Mr. Clark:

Q. Well, I will call attention to it again. Did you consider you was a friend of hers when you wrote Mr. Wagg to this effect: "You send me a statement that you will not record her affidavit without my consent and that will let me out. You will have no trouble getting my consent if it needs recording"?

A. Yes sir. That is the same as the agreement I had with Mrs. Herbert, the same as though I had held it myself. Mrs. Herbert tried to get that statement from me, and Mr. Wagg tried to get it from me, and I didn't give it to either of them.

Q. Why did you want Mr. Wagg to write you that he would not record the affidavit without your consent, and then promise him that he would not have any trouble getting your consent, if you did not want that letter to show to Mrs. Herbert, to deceive her?

Mr. Wrightsman: Objected to as argumentative, and misconstruing the statement of the letter.

The Court: Objection sustained.

Mr. Clark:

Q. You think in all this transaction, Mr. Drown, you was as fa to Mrs. Herbert as you was to Mr. Wagg?

A. I do, yes sir. The mortgage would have been foreclosed if had not been for me.

424 Q. Was there anything in the communications betwe you and her that would aid in driving a good bargain th you withheld from communicating to Mr. Wagg?

A. Well, I don't remember of anything. Mrs. Herbert and were not in the same relations that Mr. Wagg and I were.

Q. How is that?

A. Mrs. Herbert and I were not in the same relation in rega to the transaction that Mr. Wagg and I were.

Q. What was the difference?

A. The difference was that I had told Mr. Wagg if he would cept a part of the land in settlement, I would take a half interest w him, to show him that I was sincere in advising him to take There was no such proposition between Mrs. Herbert and myself.

Q. Why didn't you tell Mrs. Herbert that you was so much terested in securing the settlement for her that you agreed to ta half of it yourself, in order to get him to accept it?

A. I didn't think it was necessary to go that far.

Q. Why didn't you tell her you had even offered to Mr. Wa to plat it and sell out the lots at a hundred dollars a lot, and f lots to the acre?

A. I don't remember making that statement. You are taki something for granted there that has not been established. T lots were platted at three lots to the acre, and sold from ten twenty-five dollars.

Q. I didn't ask you that.

A. I am telling you.

Q. You have told it so many times.

A. You ask so many questions the same kind.

Q. Did you think that was in my last question, Roy?

A. You have asked the same question three times.

425 The Court: Please don't argue the matter with the ness.

Mr. Clark:

Q. How many lots had you sold, or how many lots did you c tract, between the time you platted it and May, 1902, the mid of May, 1902?

A. I think about one hundred and fifty or sixty lots, probably have a book there that shows the sales of the lots.

Q. Well, that is your best recollection, one hundred and fifty sixty?

A. I should estimate it at that; yes sir.

Mr. Clark: That is all.

Redirect examination by Mr. Biddison:

Q. Mr. Drown, did you preserve copies of your letters to Mr. Wagg?

A. No sir.

Q. Do you know, Mr. Drown——

Mr. Clark: Wait a moment.

Cross-examination by Mr. Clark continued:

Q. I will ask you, Mr. Drown, if it is not a fact that when that deed came on in March, 1901, to be signed by Mrs. Herbert, if you did not tell her if she would sign that deed, and settle this in that manner, that you and Mr. Wagg would, when it was platted, give her an interest in the lots?

A. No, there was nothing of that kind promised to Mrs. Herbert.

Q. Was there anything said upon the subject of platting it, and giving her an interest in the lots, if she would sign the deed?

A. Not that I remember of. I think before the twenty-five acre proposition was decided on, that I had told her if her home place was not filled out there, I would see she got two or three lots
426 along the north, to fill out her garden and orchard there.

Q. Do you say, Mr. Drown, that you did not have any conversation with her when that deed came on the first time, in March, 1901, upon the subject of her signing that deed, and of the land being platted, and of her having an interest in the lots?

A. I don't remember of anything, Mr. Clark, other than what I have told you.

Q. Will you say you did not?

A. I don't remember of anything else.

Mr. Clark: That's all.

Redirect examination by Mr. Biddison:

Q. Mr. Drown, do you know at what prices property was selling in and around Cleveland about the time you took this deed from Mrs. Herbert?

A. Yes.

Judge Dale: Objected to as incompetent; under the rule of the court, all the witnesses that can go to the question of values have already been used.

Mr. Biddison: We are not going to use him on that, but simply to show his information at that time was that none of the land around there was selling at that high a price.

Judge Dale: The only purpose of that kind of testimony at this time would be to determine the value of that property at the time they took the deed. They have used five witnesses on that, the same as we did.

Mr. Biddison: Five opinion witnesses on that proposition.

Mr. Wrightsman: This goes to the good faith of the transaction.

427 Judge DALE: You could have used him upon the proposition.

Mr. WRIGHTSMAN: This is a matter of good faith.

Judge DALE: That is not the way to prove good faith.

Mr. WRIGHTSMAN: Yes, sir, this is the most pertinent way o proving it.

The COURT: Answer the question.

Judge DALE: Note an exception.

A. Yes, sir, I do.

Mr. BIDDISON:

Q. What properties do you know of selling in and about Clev land at about the time of this transaction of your taking that dee from Mrs. Herbert?

Judge DALE: Objected to as incompetent, and because the cour has heretofore——

The COURT: Well, I will stay by that rule, but this does n violate it, so far. Objection overruled.

Judge DALE: Note an exception.

A. In April, 1901, the Jordan Valley Town Company sold t Mr. S. S. Sloan——

The COURT: No, you was not asked to tell what it sold for. Yo was asked if you knew of any tracts selling.

Mr. BIDDISON:

Q. Do you know of any other tracts selling in or about Clev land about that time?

A. Yes sir. The Sloan tract was the nearest to that time.

Q. Other than the Sloan tract?

A. Yes sir, the Kinney tract.

Q. Where was the Kinney tract?

A. On the north——

Mr. CLARK: This must refer to his knowledge of conditions that time. The Sloan tract, as I understand it, was sold some tin after this deal was closed.

A. Before.

428 Mr. BIDDISON: No sir, before this deal.

Judge DALE: The Kinney tract was sold a long time befor

The COURT: Well, that is a question of fact.

Mr. BIDDISON:

Q. Do you know when the Kinney tract was sold?

A. Sold in November, 1900.

Q. Do you know at what price it sold?

Judge DALE: Objected to as incompetent.

The COURT: Overruled.

A. Twenty-seven hundred——

The Court: Wait a minute. You were not asked that question. You were asked if you know; yes or no.

A. Yes sir.

Mr. Biddison:

Q. Do you know what size the Kinney tract was?

A. About a hundred and——

Mr. Clark: Wait a minute.

A. Yes sir.

Mr. Biddison:

Q. Do you know where it was with reference to the Cleveland townsite?

A. Yes sir.

Q. And with reference to the Herbert tract?

A. Yes sir.

Q. Where did it lie, with reference to the Cleveland Townsite, and the Herbert tract?

A. North of both.

Q. Joining?

A. Yes sir.

Q. At what price did it sell?

Mr. Clark: Wait a minute. To that we object.

The Court: Objection sustained.

Mr. Biddison:

Q. Do you know of any other tracts selling in or about Cleveland at about that time?

429 A. The tract——

Mr. Clark: I object to the question, unless he knew it at that time.

A. Yes sir.

The Court: Yes, it should be confined to his knowledge at that time.

Mr. Biddison:

Q. Well, did you at that time know of any other tracts selling in or about Cleveland?

A. Yes sir.

Q. What other tract?

A. The tract that Mr. Loterette bought from Lee Jordan.

Q. Where is that, with reference to the Cleveland townsite?

A. Joins it on the northeast.

Q. What size tract was it?

A. Eighty acres.

Q. Do you know at what price it sold?

A. Yes sir.

Q. What price?

Mr. Clark: To that we object.

The Court: Objection sustained.

Mr. Biddison: Exception.

Mr. Biddison: I may not understand the rule. I would like to inquire of the court: That no other testimony will be permitted upon the questions of values of land down there?

The Court: It was limited to five witnesses, and you had the opportunity of making your selection of the five you wanted to use. And they used their client and three or four others on the question of value.

Mr. Biddison: I understood the limit to be the limit of expert witnesses on that question.

The Court: No, experts, or any other class. It is the character of the testimony.

430 Mr. Biddison: We except to the rule, so far as it limits us beyond the expert testimony. That is all.

Recross examination by Mr. Clark:

Q. Now, Mr. Drown, you say at the time this deed was made you were familiar with the prices at which lands had sold about Cleveland?

A. Yes sir.

Q. And you had been familiar with the selling price of land from that time previous clear up to the time of the giving of this mortgage.

A. Yes sir.

Q. Had the values of land—Did you know the relative condition as to the values of land in that community between the time of the giving of the mortgage, and the time of taking this last deed?

A. I would judge it would be about the same.

Q. Wait a minute. It just asked you whether you knew the relative value of lands?

A. I think I did.

Q. You wrote to Mr. Wagg the letter referred to and read on yesterday, written July 28, 1898, concerning the value of this land, and of the value of land in the surrounding country, did you not?

A. To Mr. Wagg?

Q. Yes sir.

A. I think I did.

Q. Did you at that time give him an honest account, truthfully, as to the value of land in that community at that time?

Mr. Biddison: Objected to, as calling for the truthfulness of some other statement.

431 The Court: Objection sustained.

Mr. Clark:

Q. I will ask you whether or not you knew at the time this loan was made, or before it was made and on July 29, 1898, that this land, this Herbert land, would at that time have brought at auction, for its intrinsic value as farm land, fifteen dollars an acre, at the time the loan was made?

Mr. WRIGHTSMAN: That is, the eighty acres, you mean?
Mr. CLARK: The eighty acres.

A. I gave Mr. Soderstrom's opinion as to that.

Mr. CLARK:

Q. Did you know at that time that there was a claim lying south of the Herberts, further from town, which had never been deeded from the government, and had sold within a year prior to that time at $14.37 an acre, a hundred and sixty acre tract for twenty-three hundred dollars?

A. Sold when?

Q. That it sold within a year prior to July 29, 1898?

A. I think that was part of my information to Mr. Wagg, was it not?

Q. And did you not know at the time of writing that letter, that the Herbert land was undoubtedly much more valuable?

Mr. BIDDISON: Wait. To that we object, as seeking on cross examination to get over the rule limiting the witnesses on the question of value.

Mr. CLARK: I am simply asking him what he knew at that time.

Mr. BIDDISON: And not proper cross examination.

Mr. CLARK: I am not asking him whether it was worth that, but the condition of his mind, knowledge?

The COURT: I don't think we are gaining any information by simply having him repeat what he wrote in the letters.

432 Judge DALE: I guess we have got the letter in evidence, haven't we?

The COURT: Yes sir.

Judge DALE: Well, let it go at that.

Judge DALE:

Q. Was this hundred and twenty acres you referred to in this letter the Kinney land, the loan of two thousand dollars on? You refer in this letter to a hundred and twenty acres lying north of town——

Mr. CLARK:

Q. I will ask you whether or not the land referred to in your letter of July 29, 1898, upon which the Bank of Pawnee had loaned over two thousand dollars, on one hundred and twenty acres of land lying north of the town of Cleveland, which is as good farming land, but not as well located,—I want to know whether or not that is the Kinney land, that you have just testified you knew its value?

Mr. WRIGHTSMAN: Wait a minute. Objected to as assuming that there was a loan of two thousand dollars on the land, which is not the fact.

The COURT: He is simply referring to his statement on that matter.

A. I think it is a portion of the Kinney land, yes sir.

Mr. **Clark**:

Q. A hundred and twenty acres on the Kinney land?
A. I think so.

Mr. **Clark**: That's all.
Mr. **Biddison**: That's all.
The **Court**: Call your next witness.
Mr. **Biddison**: If the court please, Mr. Litten is here, in response to subpœna, and we are willing, to accommodate him, to put him on for that cross examination, in order that he may get back on the evening train.
The **Court**: Call him now.

433 W. T. **Litten**, being recalled for further cross examination on behalf of the defendant, testifies as follows:

Cross-examination by Mr. **Biddison**:

Q. Were you a witness in this case at the formal trial of the case, Mr. Litten?
A. I believe I was, yes sir.
Q. Do you recollect testifying at that time?
A. I recollect trying to. The court and about four lawyers got mixed up in a question that was asked me, and I finally answered it.
Q. I will ask you if you recollect this question being asked you by Mr. Clark: "I will ask you what would be the fair value of that land about the 20th of May, 1901, for all purposes?" and then the court said, "State what, in your judgment, it was worth," and did you not answer, "Well, it couldn't be worth over fifty dollars, and I rather think forty dollars would have been a fair price for it?"
A. Yes, I presume I made that answer, but at the time there was a conflict arising between the attorneys, and my opinion was mixed as to the time that was in question. The question was first asked as to the value of the land when the mortgage was made, and when the deed was made, and I now discover for the first time that there has been two deeds made to this land here, the evidence here to-day.
Q. I will ask you if your answer was not in response to this question by Mr. Clark: "I will ask you what would be the fair value of that land about the 20th of May, 1901, for all purposes," and if your answer was not, "Well, it couldn't be worth over fifty dollars, and I rather think forty dollars would have been a fair price for it?"
434 A. That is the record of the stenographer, is it? Is that the record of the stenographer. I want to know that.
The **Court**: Answer the question.

Mr. **Biddison**:

Q. It is.
A. Well, if he has got it that way, that is the record.
Mr. **Biddison**: That is all.

Redirect-examination by Judge DALE:

Q. Mr. Litten, I will ask you if, at the time the question arose before the court, during the time you were testifying, as to whether or not you could place any valuation upon the land for anything other than farming purposes, if that question was asked?

A. I can't say as to whether that question arose, but this question did arise: The question was asked in regard to when the deed was made, and when the mortgage was made, and I now find that there was two deeds made, which is my first discovery of that fact.

Q. Now, were you asked, or do you now at this time recall the fact, that this answer was given in response to the question of the time relating to the date when the mortgage was given in 1898?

A. That is the time at which I attempted to make the answer. Whether I did or not, I can't say. That is what I thought I was answering about.

Q. That is, in 1898, the date when the mortgage was made?

A. Well, I say in 1898; I say the time when the deed was executed in my presence.

Q. The escrow deed?

A. Yes sir.

435 Q. That escrow deed was placed in your bank?

A. Yes sir.

Q. Is that all the deed you knew anything about?

A. That is the only one, until to-day I discovered otherwise.

Q. Then you had in mind the date of that escrow deed, which was October, 1898, is that correct?

A. It seemed to me it was made in July; but it was some time in 1898.

Q. You now think—you still think that the land in 1901, in May, was worth as much as you stated on yesterday?

A. Yes sir, I do.

Judge DALE: That is all.

Recross-examination by Mr. BIDDISON:

Q. Mr. Litten, I will ask you if it is not a fact that, in connection with that question, that nothing was said about deeds or mortgages at all, and if these were not the preliminary matters that led up to it. First, a question by Mr. Clark: "Now, I will ask you what would be the fair, reasonable market value of that land, for farming purposes, in the year 1901?" And the court then said: "Well, for any purpose. Why limit it, Mr. Clark; for the purpose for which it was used, or may be adapted. It is not necessary to limit it." And didn't Mr. Clark then say: "Dividing the question, in order to get at it more intelligently." And didn't the court then respond: "It is the value of the land as then situated, for any purpose, as used, or may be used. It is not necessary to limit the value of the land to any particular purpose." And didn't Mr. Clark say: "I had several purposes; to give the court a better idea so as to know which one the witness was passing judgment on." And didn't the court say: "It is the value of the land about May 28, 1901".

436 And didn't Mr. Clark then ask you: "I will ask you what would be the fair value of that land about the 20th of May, 1901, for all purposes"?

A. That is too much for me to remember twelve months. If that is the record of the stenographer, that is the way it was at the time; but that is not the way I understood it at the time.

Mr. Biddison: That is all.
Judge Dale: That is all.
The Court: Call your next witness, gentlemen.

S. R. Wagg, defendant, being produced and sworn as a witness in his own behalf, testifies as follows:

Direct examination by Mr. Biddison:

Q. You may state your name.
A. S. R. Wagg.
Q. Where do you reside?
A. Appleton, Wisconsin.
Q. How long have you lived there, Mr. Wagg?
A. Eighteen years.
Q. In what business have you been engaged since being located there?
A. Making paper.
Q. What is your particular work in that connection?
A. I am superintendent.
Q. Of a paper mill?
A. Yes.
Q. How long have you been superintendent of that mill?
A. Eighteen years with two years' absence.
437 Q. How long have you known Leroy Drown?
A. Eighteen years.
Q. How long have you known A. A. Drown and his wife?
A. The same length of time.
Q. Where did you first know them?
A. At Appleton.
The Court: Where?
A. At Appleton, Wisconsin.

Mr. Biddison:

Q. Mr. A. A. Drown was formerly your pastor there?
A. Yes sir.
Q. Do you recollect the occurrence of being solicited for a loan to W. H. Herbert and wife?
A. I was, yes.
Q. Who first solicited you?
A. Mr. A. A. Drown.
Q. In the letters that have been introduced in evidence?
A. Yes.
Q. How long had it been since you had seen Mr. Drown at that time?

A. Well, I think a year or two.

Q. Was he at that time acting as a stenographer for you in any capacity?

A. No sir.

Q. Transacting any business for you for any purpose?

A. No.

Q. State to the court in what connection his solicitation for this loan came up?

A. Came in the form of a letter, asking me if I could furnish a thousand dollars for a loan——

Judge **Dale**: I object to that, as not the best evidence.

438 Mr. **Clark**: This correspondence has been introduced, and there is no use to take up the time.

Judge **Dale**: He made the loan; we admit that.

Mr. **Wrightsman**: That is very generous.

Judge **Dale**: To save all these questions.

Mr. **Biddison**:

Q. Did you subsequently make the loan?

A. I did.

Q. About how long after the first solicitation was it, before the loan was closed?

A. It was closed, I think——

Mr. **Clark**: Wait a minute. We object to that as not the best evidence.

The **Court**: And immaterial. Go ahead. Objection sustained.

Mr. **Biddison**:

Q. What did you do in the matter of furnishing that money; take the transaction as you recollect it, down to the closing of the loan?

Mr. **Clark**: Wait a minute. I submit that is not the best evidence.

The **Court**: I believe that the whole transaction was by correspondence on his part. He was not here before the money was advanced, were you?

A. No.

Mr. **Biddison**:

Q. Do you recollect how long you were in closing the loan, after Mr. Herbert had agreed with you that he would take the loan, and you had agreed that you would make it?

A. I think it was some four or five months.

Q. Do you know for how long a time you had the money in the bank at Cleveland, awaiting the closing of the loan?

Judge **Dale**: Wait a minute. Objected to as irrelevant and immaterial.

439 The **Court**: That is wholly immaterial. That is all covered by this correspondence. The loan was closed up, and this correspondence don't grow out of the making of the loan; it

grows out of the contract under which the deed was executed, and the final consummation and closing out of the land.

Mr. BIDDISON: If the court please, I would like to be heard a moment on that proposition. The matter of good faith enters into that transaction, for this purpose; of showing that he had preserved this loan for some time, and that he did it for the purpose of having a five year loan, and that he advanced the money with that intent; and that he did not want to cancel the loan for a less period than that time, without being reimbursed for the loss of the use of the money——

The COURT: Well, that would be wholly immaterial in this case, if it was all true. His good faith in making the loan is not questioned.

Mr. BIDDISON: No, but his good faith in the figures which he named, at which he would close the deal, and let them cancel the loan, are questioned.

The COURT: I don't see that that is involved here in any way.

Mr. BIDDISON: Exception.

Mr. BIDDISON:

Q. When, after the loan was closed, did you first know of any defect in the title to the land?

Judge DALE: Objected to as assuming that there was a defect in the title.

A. It was November of the next year.

The COURT: Herbert and wife both signed the mortgage.

Mr. BIDDISON: The proposition in the defect that I refer to is the proposition of accrued taxes.

440 The COURT: That is not a defect in the title anywhere.

Mr. BIDDISON: You may cross-examine.

Judge DALE: I pass.

Mr. BIDDISON: That is all, Mr. Wagg.

C. C. DUNCAN, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. BIDDISON:

Q. State your name?
A. C. C. Duncan.
Q. Where do you reside?
A. Cleveland.
Q. How long have you lived there?
A. A little over nine years.
Q. Are you acquainted with the tract of land known as the Wagg Addition to the town of Cleveland?
A. I am.
Q. How long have you known it?
A. I have known it ever since I have been in Cleveland, nine years.
Q. Are you acquainted with Mrs. Herbert?

A. Yes sir.

Q. Do you recollect of having had a conversation with her since laying out that Wagg Addition?

A. I do.

Q. And in which conversation there was talk as to the title to that property?

441 Judge DALE: Objected to as incompetent, irrelevant, and immaterial, and not proper examination, and no foundation has been laid for the introduction of any conversation of this kind.

Mr. WRIGHTSMAN: Well, in that respect, she stated that she had expressed satisfaction to no one; had a conversation with no one of and concerning the title to that land.

Judge DALE: Mr. Wrightsman asked the question if she never expressed satisfaction to any person since that time, and we objected, and I think the court excluded it.

Mr. BIDDISON: I want to show—We asked her if she never expressed satisfaction at this settlement, and states she thought she had gotten an advantageous settlement with Mr. Wagg. It is competent under the allegations of the answer, and also as impeachment.

The COURT: Objection overruled.

Judge DALE: Note an exception.

Mr. BIDDISON:

Q. Did you have a conversation with Mrs. Herbert, in which she discussed with you the settlement that she had made with Mr. Wagg?

A. Yes, Mrs. Herbert was at my house one time.

Q. When was that, Mr. Duncan?

A. Well, that was after I built. I bought a block on her addition, that is, on the Wagg addition, and built a house. Let's see. I bought the land in October, I think it was, 1901, and I built the house, and moved there in Decembr, and this was about January when she was at our house.

Q. January, 1902?

A. No—Yes, January, 1902. It was 1901 when I bought.

Q. Now, you may state what she said on that occasion, with reference to that matter.

442 Judge DALE: Wait a minute. Objected to as incompetent, because no foundation has been laid for the introduction of such testimony.

The COURT: Her declarations are admissible without any foundation. Objection overruled.

Judge DALE: Note an exception.

A. Well, Mrs. Herbert was at my house, and I happened to be at home. She used to come there every now and then——

Mr. BIDDISON:

Q. Speak louder.

A. Mrs. Herbert used to come to my house; she was at my house in January; and I says, "Mrs. Herbert, wouldn't it pay you to plat this ground and sell it out. And she says, "If I had known it would turn out this way——" She first made the proposition about hi agreeing to give her ten acres. She says, "I refused to take te acres, and afterwards I proposed to take twenty-five acres, an thought I did mighty well; I was satisfied."

Q. Was there any discussion, then, further, with reference t her making trouble?

A. No there was nothing more said; that was just about all.

Mr. Biddison: Cross examine.

Cross-examination by Judge Dale:

Q. Mr. Duncan, who was present at your house at that time?

A. Just my wife and I and Mrs. Herbert. I don't know whethe any of the children were or not; they might have been.

Q. What time of day was it?

A. It was in the evening, or afternoon.

Q. What time in the afternoon?

A. Oh, I should judge—I don't know; some time along in th afternoon; I didn't pay any attention.

443 Q. About what time?

A. I judge three or four o'clock, anyway.

Q. What was your business there?

A. Why, I lived there in town, and I was doing most any kin of work; farmed some, and freighted some, and bought some lot every now and then and sold out.

Q. You did what?

A. I was just doing any kind of business I could work and mak anything at.

Q. Now when did you first say to any person what Mrs. Herber stated to you at that time?

A. Why, I never—Not until after this trouble came up, alon after this.

Q. How long afterwards?

A. I don't know. Some time or other after everybody got to talking about it. I just remembered the conversation she had at m house.

Q. Who did you first tell it to?

A. I think O. A. Gilbert and I was talking about it, it seems t me like, the first I remember. I don't know who I did speak t about it.

Q. Had Mrs. Herbert ever been at your house before?

A. Yes, Mrs. Herbert has been at my house several times.

Q. Before that time.

A. Oh, yes, I think so. That was the first time I ever happene to be there when she was there. I think I was kind of sick, o something of the kind.

Q. That was the first time you ever happened to be there whe she was there?

A. Yes, but she has been in my house quite a number o times.

444 Q. When was she there after that time when you wer there?

A. Why, she was there, I think, one time and delivered some books, if I remember.

Q. How long after that?

A. Oh, I don't know. I never kept no account of her visits, or any other lady's.

Q. She is in the habit of coming there?

A. Why, she was in the habit of canvassing around, and being most anywhere.

Q. She was in the habit of coming there and visiting with you?

A. No, I can't say she did.

Q. Did you ever talk with her before that time about anything?

A. Oh, yes, but not about that place.

Q. Or afterwards?

A. Oh, yes, I have met Mrs. Herbert several times, but not no business relations at all.

Q. How did that conversation arise?

A. She was talking something about Mr. Wagg; I don't know how it come up; she was talking about Mr. Wagg, and that he had treated her very shabby, she said.

Q. She said Mr. Wagg had treated her very badly?

A. Yes, she seemed to think so.

Q. Talked as if he had not treated her right?

A. Yes, that seemed to be the burden of her talk.

Judge DALE: That's all.

Redirect examination by Mr. BIDDISON:

Q. When was that?

A. Why, that must have been in January, 1902. I know it was in January after I moved on the place.

445 Q. When was that with reference to the conversation that you speak of, when she said she thought she had done about as well as she could?

A. That was the same time.

Q. Did she say in what way she thought Mr. Wagg had treated her shabbily?

A. No, not in particular. She seemed to have it in for Mr. Wagg some way, and she mentioned it; probably was talking to my wife; I know I was sitting there by the stove; and I made this remark to her, if she didn't think it would have paid her to plat the ground, and sold it out herself and she made the remark, the way it turned out, it would.

Mr. BIDDISON: That's all.

Recross-examination by Judge DALE:

Q. Didn't she also say at that time Wagg wouldn't let her do that?

A. No, I don't think she did.

Q. Wasn't there something to that effect, that "Wagg had treated her mean about that matter?"

A. She said she failed to raise the money, and she made this proposition herself, to take twenty-five acres, she said.

Q. I didn't ask you that. Didn't she tell you at that time that Wagg claimed to be the owner of the land?

A. Why, she may have I don't say she didn't.

Q. Don't you say she did?

A. No, I couldn't say.

Q. That Wagg claimed to be the owner of that land?

A. Of course Wagg was the owner of the land at that time.

Q. I know, but before she made that deed?

A. No, I don't know as she did.

446 Q. Didn't she tell you she had to be satisfied with what she got?

A. I don't know. She told me before she would take ten acres, she would stand him a suit.

Q. Didn't she say she had to be satisfied?

A. No, she said she made the proposition herself to take twenty-five acres, and she said she thought she had done well——

Q. Under the conditions under which she was working?

A. Yes.

Judge Dale: That's all.

Mrs. Clawson, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Biddison:

Q. Where do you reside, Mrs. Clawson?

A. In Cleveland.

Q. How long have you lived there?

A. Two years last September.

Q. Are you acquainted with Mrs. Herbert?

A. Yes sir.

Q. How long have you known her?

A. Well, in a little while after I moved there I got acquainted with Mrs. Herbert.

Q. Do you recollect the occurrence of her husband's return home?

A. Yes sir.

Q. Do you recollect of being at her house that day?

A. Yes sir.

Q. With whom?

A. With one of my neighbors, Mrs. George Latham.

447 Q. Did you at that time have any conversation with her as to her possible interference with the occupants of the Wagg Addition?

A. Yes sir.

Judge Dale: Objected to as incompetent, irrelevant and immaterial. We haven't offered any proof on that subject.

The Court: What do you expect to show by that?

Mr. Biddison: We expect to show by this witness that she at that time said—I don't know whether just at that time, but at least at hat time or some other one day, that she said she didn't have any intention of interfering with the occupants of the townsite; that she might try to make Mr. Wagg pay something for Mr. Herbert's signature to that deed, or something to that effect.

The COURT: Objection sustained.

Mr. BIDDISON: Exception.

Mr. BIDDISON:

Q. I will ask you if——

Mr. BIDDISON: For the purpose of making the record——

The COURT: Well, for the purpose of making the record, the ourt will say now that the evidence being taken at this time is not ntended for, nor does the court intend to determine on the evidence aken the rights of the purchasers from Wagg since he obtained this leed from Mrs. Herbert. I don't want to bar them by anything, nor ave it appear that their rights may be adjudicated on this evidence. f the determination should be adverse to your client, then those ssues will be taken up and determined.

Mr. BIDDISON: If the Court please, the purpose of this testimony oes beyond that; to show that she did not intend at that time, or id not think of any dissatisfaction with this transaction, other than she might get some money out of Wagg, to secure Her-
48 bert's signature to that deed. That there was no complaint of oppression, or anything of the kind.

The COURT: Well, that would be based upon the same ground, I uppose, that the title was defective.

Mr. BIDDISON: It goes to show her feelings at that time.

The COURT: Well, do you contend that she expressed the opinon to this woman that she was satisfied with the deal with Wagg?

Mr. BIDDISON: Yes, that she did not have any complaint to make f her own deal at all.

The COURT: Proceed:

Mr. BIDDISON:

Q. You may state what, if anything, Mrs. Herbert said to you ith reference to the title to that land, and what she or Mr. Herbert ould do after his having returned, about the title?

Judge DALE: Objected to as immaterial, irrelevant and incometent.

The COURT: Overruled.

Mr. BIDDISON:

Q. State it.

A. Well, I don't know as she said that day.

The COURT:

Q. Don't know what?

A. That day that I went in there, I don't believe, on this other question that you overruled, Your Honor. It was not said that day. I presume after her and Mr. Herbert talked it over——

Mr. **Clark**: Wait a minute.

Mr. **Biddison**:

Q. At this later time, how much later was this other conversation you speak about?
A. Why, I couldn't say. Just every few days she came over there to see me; and was over there several times.
Q. On these occasions, what did she say with reference to her intentions about the title to that Wagg
449 Addition, or her satisfaction or dissatisfaction with it?

Judge **Dale**: Objected to as incompetent, irrelevant and immaterial.

A. Well, at one time I asked her—She was telling me about the money she got, and I says, "It looks like to me at the time you mortgaged that, you got all it was worth;" I didn't say at the time she mortgaged it; I says, "It looks to me like a thousand dollars was all this was worth——

Judge **Dale**: Objected to as not responsive to the question.
The **Court**: Overruled.

A. She said it was; that she got just about all it was worth; that was about the amount of it at that time. But she says, "Now look at the land; it is worth twice that amount, and if I can get damage, if I see some way I can, I expect to get damage off of Mr. Wagg, if there is any way to have it."

Mr. **Biddison**: Cross examine.

Cross-examination by Judge **Dale**:

Q. What time was referred to, about this thousand dollar talk?
A. Well, some time later. I didn't just keep the exact dates; I was not expecting trouble.
Q. Who else was there at that time?
A. There wasn't no one. I was sick, and she came over to see me.
Q. To wait on you?
A. Sir?
Q. To wait on you, or assist you?
A. No, I don't think she did; she was too precise for that.
Q. You were sick, and she dropped in to see you?
A. Well, she came in often; she came in every few days; we lived close.
Q. Were you in bed?
A. Well, I had been in bed, but I got up when she came in.
450 Q. How long did she stay there?
A. Well, I didn't time her.
Q. Well, about how long?

A. She generally staid as long as I wanted her to; about an hour I presume, or a little longer.

Q. What do you mean by that, that she staid as long as you wanted her to?

A. Because she tired me of her talk; it was the same old thing.

Q. She what?

A. She tired me of her talk; it was the same old thing.

Q. About the land; is that it?

A. About this land, yes sir.

Q. She was complaining about the way she had been treated, was it?

A. No sir, she just asked me whether I was worrying over this trouble, and I said, "No, Mrs. Herbert, I haven't any trouble; I don't know what you mean."

Q. Was that all? She tired you about asking you that?

A. Well, that, and some other things along the same line. She would talk along that line, and my hearing outside—This was after Mr. Herbert came home. Of course the talk was general then, and I had heard they was both rascals, and I asked questions, of course it was natural for me to ask questions concerning our property there, and our home; it was all we had.

Q. You were very much worried about that, were you?

A. No sir, I was not worried.

Q. Why did you ask these questions, then?

A. I was not worried enough to make me sick over it. I generally asked questions, because she wanted me to ask them.

Q. She was over there frequently, was she?

A. Yes sir.

451 Q. Talked about an hour each time about her troubles?

A. I never timed her.

Q. Is that your judgment about this?

A. I say I never timed her.

Q. Will you tell us about how long you think she staid on these several occasions? What do you think about that?

A. Well, I couldn't say. As I say, I never timed her. If I had thought of it I might.

Q. Now, don't you know she was not satisfied at all with the way Mr. Wagg treated her?

A. Well, from the reports I heard, she never was satisfied, unless she was doing some one.

Q. Well, that was not the question I asked you. Now I will ask you the question again. Didn't you understand from her complaints that she was not satisfied with the way Wagg had treated her?

A. No sir.

Q. And didn't she talk with you about it an hour at a time?

A. Yes, sir; she would tell me not to be worried, she wouldn't bother innocent purchasers, because she couldn't. Wagg, if she done anything—but he didn't know what she would do—would be the one.

Q. Your feeling is friendly towards Mrs. Herbert, isn't it?

A. No sir, not now. I don't think it could be, under the circumstances. It was at the time. I liked Mrs. Herbert real well.
Q. You did?
A. Yes sir.
Q. Had a great affection for her, did you not?

Mr. Biddison: Objected to as argumentative.

452 A. No sir. I liked her as a neighbor; I didn't know her long; I hadn't knowed her but just a while. I liked all my neighbors, and I treated her as one.

Judge Dale:

Q. You don't like her now?

Mr. Biddison: Objected to as having been asked and answered.
Judge Dale: That is all. Stand aside.

Mrs. Broadbank, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct-examination by Mr. Biddison:

Q. State your name.
A. Mrs. Broadbank.
Q. Where do you reside?
A. Cleveland.
Q. How long have you lived there?
A. Five years.
Q. Are you acquainted with Mrs. Herbert?
A. Yes sir.
Q. How long have you known her?
A. Four years.
Q. Do you recollect the occasion of a conversation with her and one Jennette, who was driving the hack between Cleveland and Pawnee, at your home?
A. It was not at my home.
Q. Where was it?
A. At his home.
Q. Do you recollect such a conversation?
A. Yes sir.
453 Q. You may state that conversation.

Judge Dale: Objected to as incompetent, irrelevant and immaterial.
The Court: Overruled.
Judge Dale: Exception.

Mr. Biddison:

Q. You may state the conversation, the court said.
A. She should have said that Mr. Wagg had good title to the land, and he should give good title, and the conversation started in regard to our title to the land we had sold.
Q. Now, just state all the conversation.

A. And he had asked in regard to the time, to find out whether was good, or not, because he was interested, and wanted to buy.

Q. Did he ask her?

A. He asked me, after she said the title was good. He didn't now she was interested in it at that time.

Q. What was she doing there at that time?

A. She was peddling books.

Q. Now, state just what she said, as near as you can, with refernce to the title to that land.

A. She said, why shouldn't Mr. Wagg give good deeds, as he had ood deeds; that it was her homestead, and he had good deeds r it.

Q. Now, about when was this conversation?

A. It was the last of September, or the first of October, 1902.

Mr. Biddison: You may cross examine.

Cross-examination by Judge Dale:

Q. What kind of a day was it that day, cloudy or sunshiny?

A. Well, it was a fairly reasonable day, I guess, for book agents and such like as that, to visit. I was away from home, and Mrs. Herbert was away from hom-, so it couldn't have been very bad. 54

Judge Dale: That is all.

S. S. Sloan, being produced and sworn as a witness on behalf of e defendant, testifies as follows:

Direct-examination by Mr. Biddison:

Q. State where—State your name.

A. S. S. Sloan.

Q. Where do you reside?

A. At Cleveland, Oklahoma.

Q. How long have you lived there?

A. Well, I have lived there three years.

Q. Where did you live prior to that time?

A. I lived in Pawnee for five years.

Q. Do you recollect the occurrence of making some deal with s. Herbert for what is known as the Wagg Addition to the town Cleveland?

A Yes sir.

Q. You may state what that arrangement was.

Judge Dale: Objected to as incompetent, irrelevant, and imterial.

The Court: Overruled.

Judge Dale: Exception.

A. Well, I bought fifty-five acres of land, or contracted for it, a way, with Mrs. Herbert, some time in February, 1901, I think.

5 Mr. Biddison:

Q. In what way was it to be paid for, and what kind of title were to get?

Judge Dale: Oh, I object to that, as incompetent, irrelevant and immaterial, what kind of a title he was to get.

The Court: Overruled. Answer the question.

Judge Dale: Note an exception.

A. Well, sir, it was to be paid for in cash.

Mr. Biddison:

Q. What kind of a title were you to have?

Judge Dale: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Clark: It calls for a conclusion.

The Court: Yes, that is proper.

Mr. Biddison:

Q. What did you say to her in reference to the title, or she say to you in reference to the kind of title you were to have?

Judge Dale: Objected to as incompetent, irrelevant and immaterial. It is to be presumed he was to have a good title.

The Court: I don't know whether that is true or not. She might have been selling him what she had.

Mr. Biddison:

Q. The court says answer the question.

A. There wasn't anything said as to the title, except that there was a mortgage on the land, and the money was to be deposited in the First National Bank here at Pawnee, to pay that mortgage off, and of course the title question was to come up again. I was to have a clear title, was my understanding.

The Court:

Q. There was nothing said by her about the title?

A. No sir.

Mr. Biddison:

Q. To refresh your memory, was there anything said about whether Mr. Herbert was to sign the deed?

A. No sir.

456 The Court:

Q. You agreed to pay fourteen hundred dollars?

A. Fourteen hundred and fifty.

Q. Why didn't you consummate it?

Mr. Biddison: You may cross examine.

Cross-examination by Judge Dale:

Q. Mr. Sloan, you put that money in the bank here, did you?

A. Yes sir.

Q. And you wrote, or caused a letter to be written to the owner, Mr. Wagg, with reference—to the owner of the mortgage, that the money was there for him?

A. Yes sir.

Q. To satisfy the mortgage.

A. That was the intention, yes sir.

Q. You intended to have it applied in that way, didn't you?

A. Yes sir.

The COURT:

Q. What date was that?

A. I think it was some time in February.

Q. 1901?

A. Yes sir. I am not positive as to the date, but it was somewhere right about that time.

Q. Well, why didn't you consummate the trade?

Judge DALE:

Q. Got a letter from Mr. Wagg, did you?

A. Do you want me to tell why I didn't consummate it?

Mr. WRIGHTSMAN: Yes sir; that is the court's question.

A. The money laid there for something like three weeks, possibly longer; but it was three weeks before I heard anything from it at all. The first I heard, Mr. Shapard, the banker, told me that he had gotten a letter——

The COURT: Well, that wouldn't do.

A. Well, I was notified I couldn't get it; that it was in the hands of Mr. Drown.

457 The COURT:

Q. That is, the bank that held the money for you gave you that notice?

A. Yes sir.

Judge DALE:

Q. That it was in the hands of Mr. Drown?

A. Yes sir.

Judge DALE: Now, if the court will remember the letter——

Mr. BIDDISON: Are you through?

Judge DALE: Yes sir.

Redirect examination by Mr. BIDDISON:

Q. Now, Mr. Sloan, I will ask you if this deposit of this money in there was not to be paid over to the mortgagee, only in the event you could get a good title to the land, and wasn't he so notified?

Judge DALE: Objected to as incompetent, irrelevant and immaterial.

Mr. CLARK: And asks for the contents of the letter.

Mr. BIDDISON: If the court please——

The COURT: He sayd there was nothing said between himself and Mrs. Herbert about the title at all. He expected to get a good title.

Mr. **Biddison**:

Q. This notice that you speak of, was it sent to Mr. Wagg in regard to the matter?

A. I don't know.

Q. You don't know that he was notified?

A. No sir, I don't know it for a fact.

Q. Did you give Shapard any instructions about the deposit of that money there?

A. I did.

Q. What were those instructions?

A. That it was to be turned over to Mr. Wagg when I got title to the land, and the mortgage was released.

458 Q. When you got title?

A. Yes sir.

Mr. **Biddison**: That's all.

Judge **Dale**: That's all.

Judge **Dale**: Now, if the court please, we identified a letter, that he would have to see Mr. Drown; that it was too late; and that thirteen hundred dollars wouldn't buy it; that he wanted more money than that.

W. E. **Deem**, being produced as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. **Biddison**:

Q. Where do you reside, Mr. Deem?

A. Cleveland.

Q. How long have you lived there?

A. Eleven years.

Q. Are you acquainted with Mrs. Herbert?

A. Yes sir.

Q. Did you have a transaction with her, with reference to the purchase of fifty-five acres of the Herbert homestead?

A. Yes sir.

Q. About when was that?

A. It was some time early in the spring of 1901.

Q. Was that transaction oral, or in writing?

A. It was just a verbal contract.

Q. Now, you may state what that transaction was?

Judge **Dale**: This is a repetition with this witness.

459 Mr. **Biddison**:

Q. State what your transaction with Mrs. Herbert was with reference to that fifty-five acres of land?

Mr. **Clark**: Wait a minute. Permit me to ask one question of the witness, whether or not his proposition was not submitted in writing, and for that purpose I would like to submit to him a copy, and ask him whether he does not recognize it. I will ask you to examine that, Mr. Deem.

A. I don't know whether I can see without my glasses.

Mr. Wrightsman: Let me see it first.

Judge Dale: Wait a minute. Let the witness look at it.

Mr. Wrightsman: Pardon me. Counsel have a right to see it any time it is offered to the witness.

Mr. Clark: While the counsel are examining it, I desire to submit to the witness a letter enclosed with the contract, containing the witness's signature.

Mr. Biddison: I desire to examine it.

The Court: Let the witness examine it, and then you can examine it before he answers.

Mr. Biddison: Proceed to ask your questions.

Judge Dale: I want to wait until the witness examines the letter.

A. Here is something I can't understand; I can't make out that word there.

Judge Dale: Let me take my glasses, maybe I can tell you what it is. "Let me hear at once by bearer."

A. Oh yes, by bearer.

Judge Dale:

Q. Is that your writing?

A. No, I think not. If it is, it beats anything I ever did do. No, it is not my writing.

Q. Well, did your daughter write that for you?

A. I think so, it looks like her handwriting.

460 Q. She signed your name to it in your presence?

A. I don't know as to that.

Q. But it expresses your sentiments, don't it?

Mr. Wrightsman: Let him answer one question at a time.

The Court: Yes, give him a chance. Have you read it?

A. Yes, but some of it I didn't understand clearly. I think I understand it pretty fair now.

Judge Dale:

Q. Who wrote that? Did your daughter write that, also?

Referring to the first instrument handed to the witness.

A. I don't suppose it is necessary for me to read this all over; I recognize the handwriting.

Q. As your daughter's?

A. Yes sir.

Mr. Biddison:

Q. It is the handwriting of your daughter, Mrs. J. P. Martin?

A. Yes sir.

Q. Does that contain your offer to Mrs. Herbert?

A. It don't seem to be quite right. Our talk was for fifty-five acres. That seems to be for only fifty. I think it must be a mistake in Gertie's writing.

Judge **Dale**:

Q. You sent that with somebody to her, didn't you? You sen those instruments to Mrs. Herbert, did you not?

A. I don't remember whether I sent them, or took them myself I must have sent them, according to that. I don't really know; can tell better by that.

Mr. **Biddison**:

Q. Did you deposit the money mentioned in that letter?

A. The fourteen hundred and fifty?

Q. Yes.

A. Yes sir. That is, the man——

461 Q. In the First National Bank in this town?

A. My understanding in regard to that is that Jim depos ited the money. It was in a Pawnee bank. I think it was the Firs National.

Q. Do you know what notice, if any, was sent to Mr. Wagg in ref erence to that matter?

Judge **Dale**: Objected to as immaterial, and incompetent.

The **Court**: Objection sustained.

Mr. **Biddison**:

Q. Did you have any talk with Mrs. Herbert after that, with reference to that transaction?

Judge **Dale**: Same objection; incompetent, irrelevant and imma terial.

Mr. **Biddison**:

Q. After the money had been put up?

The **Court**: Objection overruled.

A. After that time, after the money had been put up?

Mr. **Biddison**:

Q. Yes.

A. Yes sir, I think quite often; several times.

Q. About how long was that money up?

A. About thirty days.

Q. About when was the last conversation that you had with her, with reference to the matter, before taking the money down?

A. Oh, a day or two.

Q. You may state that conversation.

Judge **Dale**: Objected to as incompetent, irrelevant and immaterial.

The **Court**: Objection overruled.

A. Well, I don't know whether I can do it, word for word, but in substance, it was the fact that I was going to take the money down, and I didn't think she was in good faith in the agreement.

Judge **Dale**: Oh, I object to that.

462 Mr. BIDDISON:

Q. Was anything further said at that time?

A. Why, yes, we had quite a little talk. I went down there and got a letter. First come up a little conversation, to get the letter back, and I got it, and then I told her I didn't think she was in good faith at that time in the matter——

Mr. CLARK: Now, I submit what he said——

Mr. BIDDISON:

Q. What letter was it you got back?

A. I don't know whether you would call it a letter or not. It is the instrument of writing Mr. Martin got from the banker, stating what the money was put in the bank for, and what was to be done with the money.

Q. And was that the instrument to be sent to Wagg?

A. Yes, that was to be sent to Wagg.

Q. How did you get that back from her possession? Just state what that conversation was in reference to that?

A. Well, I don't know word for word, but——

Mr. CLARK: This is objected to, for the reason that it does not tend to prove any issue in this case.

The COURT: The plaintiff testified herself that she had the money deposited in the bank to pay Mr. Wagg thirteen hundred dollars, and that she was to have a hundred and fifty dollars out of it, and that thirteen hundred was to go to satisfy his mortgage, for which she was to convey fifty or fifty-five acres.

Judge DALE: Fifty-five acres.

The COURT: The contract says fifty. It is my recollection that she said fifty-five. Now, that was introduced for the purpose of showing, as I comprehend it, that Wagg was refusing to accept the money and raise the mortgage. Now, if it was for some other cause than Wagg's refusal, it would be material.

463 Judge DALE: Well, they don't propose to do that. They can't contradict Mr. Wagg's own letters. We have offered his letters in evidence, stating that he had received notice of the fact that the money was there for him, if he would release his mortgage, but he wouldn't release it; and to see Mr. Drown; and he so told Mr. Deem, this gentleman.

The COURT: That may be true. Of course I don't keep the run of this as well as you gentlemen who have been over it a number of times. Have you got that letter? If so, dig it up. I remember there was one, but I don't remember which one it referred to, whether it was the Sloan offer, or the Deem offer.

Mr. CLARK: Here is one of Wagg's letters pertaining to one of those offers, March 18, 1901.

Thereupon Mr. Clark read the same as follows:

S. R. Wagg, Appleton, Wis.

March 18th, 1901.

Mrs. W. H. Herbert, Cleveland, Oklahoma.

My Dear Madam: Your letter of March 5th came duly to han
The option extended to you, expired on the 1st of March. On Marc
4th I sold a part to Le Roy M. Drown & it is out intention to dee
you the house & a liberal piece of land in the early future.

I think I can safely say Mr. Drown will accord you every courtes
and the most generous treatment in which I shall concur.

Yours very truly, S. R. WAGG."

464 Judge Dale: Here is the letter to Mr. Deem.

Thereupon Judge Dale read the same as follows:

S. R. Wagg, Appleton, Wis.

April 21st, 1901.

W. E. Diem, Cleveland, Okla.

My Dear Sir: Your enquiry at hand. If you want to buy m
land west of Cleveland see Leroy M. Drown, of that city.

Yours, S. R. WAGG.

Judge Dale: Here is the letter to the First National Bank o
Pawnee.

Thereupon Judge Dale read the same as follows:

S. R. Wagg, Appleton, Wis.

April 21st, 1901.

First Nat. Bank, Pawnee, Okla.

Gentlemen: Your favor of the 28th at hand enquiring abou
the purchase of a piece of land at Cleveland, Okla., formerly owne
by Mrs. Herbert and now owned by the writer.

The time at which Mrs. Herbert had to take it up or find a buye
had expired some time before any notice was sent me and a partia
sale has been made to Leroy M. Drown of Cleveland.

If Mr. Sloan still wants to buy he had better communicate wit
him. It will take more than $1300 to buy it now.

Yours truly, S. R. WAGG.

465 The Court: Proceed, gentlemen.

Mr. Biddison: What is the ruling of the court?

The Court: The order of the court is to proceed.

Mr. Biddison: Read the question.

Thereupon the question was read by the stenographer.

Judge Dale: We object, as incompetent, irrelevant and imma
terial. He is seeking to show now that he went to her and got bac
some papers, and it is wholly immaterial; Wagg had refused to ac
cept the money.

Mr. Biddison: I want to show, if the court please, that Wagg had no notice of that money being there. That that proposition—the certificate of the bank to be sent Wagg was kept by Mrs. Herbert, and she never did send it at all, for his notice, knowledge, or acceptance, the certificate of the bank that the money was there and would be turned over on his releasing the lien.

Mr. Clark: We have Wagg's letter declining to accept the money.

Mr. Biddison: With reference to the Sloan matter.

The Court: He wrote a letter to Deem there.

Mr. Biddison: Yes, sir, he wrote a letter to Deem with reference to the purchase of the land.

The Court: Where is Deem's letter to him?

Mr. Biddison: That matter is not connected at this time, of course, by reason of the failure to have the letter of Mr. Deem, all the notice he had with reference to that matter, which was conditioned upon obtaining a good title, and buying it from Wagg, and Wagg did not take it as a purchase proposition.

Judge Dale: Well, if necessary we can bring the Bank President
in here with the letters, tending to fully establish that he
466 notified this man also. Mr. Deem, the other day I asked
him if he remembered writing a letter to Mr. Wagg, and
he said he hadn't any remembrance.

The Court: I remember that. He didn't remember anything about the transaction when he was on the stand before.

Mr. Biddison: This is another transaction.

The Court: No, this is the transaction he was asked about when he was on the stand the other day, and he didn't remember anything about it; and I think probably now he don't know much about it.

The Court:

Q. You say Mr. Martin was doing this, putting up this money, and making the deal?

A. No sir, I was making the deal. He put the money up, but he never saw Mrs. Herbert in regard to the matter, or anyone else.

Q. You saw her?

A. Yes sir, I transacted the business.

The Court: Well, go on with the examination. I will see what it is.

Mr. Biddison:

Q. State what conversation you had with her at the time you secured that notice of the bank from her?

Judge Dale: We object to that as immaterial here.

The Court: Well, I have overruled the objection. There is no use to repeat it so many times.

A. Well, either her or I mentioned that some amendment might be put to the letter; and I wanted it back; the trade was off, so far as I was concerned, and I wanted the letter back. And so I intimated by some talk that I would change the letter, or amend it, and so she handed me the letter back, and then I told her the trade was off, so far as I was concerned; that I was satisfied she was not acting in good faith.

Judge DALE: We object to that.

467 Mr. BIDDISON:

Q. That was the letter to Wagg?
A. Yes sir.
Q. That had been given her how long before that?
A. The letter from the banker to Wagg.
Q. That had been given her how long before that?
A. About thirty days.

Mr. BIDDISON: That's all.

Cross-examination by Judge DALE:

Q. You had written to Mr. Wagg yourself and told him you were ready to take up the loan, had you not?
A. Me?
Q. Yes.
A. No sir, not that I know of.
Q. Well, did you get a letter from Mr. Wagg?
A. No sir, not that I know of.
Q. You haven't any remembrance about that at all?
A. Not a bit.
Q. You put up the fourteen hundred dollars, or Martin did?
A. Mr. Martin did.
Q. You put it up in good faith?
A. Yes sir.
Q. And wanted to buy the land mentioned in that contract?
A. Yes sir.
Q. And authorized them to write to Mr. Wagg, telling him the money was there to clean up the loan?
A. She requested me——
Q. Didn't you authorize them to do that?
A. Authorize who?
Q. Mrs. Herbert.
A. No sir.
468 Q. Or the bank here?
A. No sir.
Q. Or anybody?
A. I didn't put up the money.
Q. Martin put it up?
A. Yes sir.
Q. Did you authorize Martin to do this, to put up the money, and do this work; did you tell Martin to do it?
A. Why, that was the understanding between him and me. I don't know whether I told him, or whether he did it od his own accord, But that was the understanding between him and I, he would put up the money, and I would transact the business.

Judge DALE: That is all.

Redirect examination by Mr. BIDDISON:

Q. You don't know upon what terms the money was deposited with the bank?
A. Yes sir.
Q. Was it to be turned over to Wagg until you got a good title?
A. No sir.

Judge DALE: Oh, I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion.
The COURT: Objection sustained.
Mr. BIDDISON: That's all.
Judge DALE: Stand aside.

469 W. C. BRIDWELL, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. BIDDISON:

Q. State your name?
A. W. C. Bridwell.
Q. Where do you reside?
A. Cleveland, Oklahoma.
Q. How long have you lived there?
A. Well, it has been my home for nearly seven years; seven years the 22nd day of September, since I first went there.
Q. In what business have you been engaged there?
A. Newspaper business.
Q. I will ask you if you published any advertisement in that paper for Mrs. Herbert during the year 1900 or 1901?
A. Yes sir.
Q. Have you a copy of the paper with that advertisement in it?
A. I have sir.
Q. Produce it.

Thereupon the witness produced a newspaper.

Mr. BIDDISON:

Q. I will ask you to identify the advertisement.
A. It is "The Triangle" Cleveland, O. T., September 13, 1900 The ad. reads as follows——

Judge DALE: Oh, I object to that.
Mr. CLARK: Immaterial, incompetent, and irrelevant, to sustain any issue, or contradict any testimony.

Mr. BIDDISON:

Q. Point out the advertisement.
A. It is on the sixth page.

Judge DALE: Let me see it please.
The witness hands the paper to Judge Dale.
Judge DALE: We don't object to it at all.
470 Mr. BIDDISON: The advertisement is as follows:
Thereupon Mr. Biddison read the same as follows, to wit:

"For sale. Forty acres of land joining Cleveland on the west part of what is known as the Herbert homestead. Apply to Mrs. W. H. Herbert."

Mr. BIDDISON:

Q. For how long did you carry that advertisement in the Triangle?

Judge DALE: Well, that is objected to as not the best evidence.

The COURT: The objection is well taken.

Mr. BIDDISON:

Q. Have you all the papers here in which that advertisement appeared?

Mr. CLARK: Objected to as immaterial.

The COURT: Objection sustained. If that is all you have got the witness for, let him stand aside.

Judge DALE: I would like to ask him one question, I would like to know whether that is a Democratic, Republican, or Populist paper.

The COURT: I don't expect he knows. It is probably published to suit the occasion. He might not want to commit himself, anyhow, under oath. Stand aside. Call your next witness.

Mr. WRIGHTSMAN: I want to recall Mr. Wagg on behalf of some of the other defendants in the case.

Mr. CLARK: We would object to the testimony in behalf of the other defendants at this time.

471 S. R. WAGG, being recalled, as a witness on behalf of the defendants, testifies as follows:

Direct examination by Mr. WRIGHTSMAN:

Q. Mr. Wagg, you made a loan, I believe you stated, to Mrs. Herbert?

Mr. CLARK: Wait a minute. Objected to as having been gone over.

Mr. WRIGHTSMAN:

Q. At that time the mortgage was sent to you, was it?

Judge DALE: Objected to as incompetent, and a repetition.

Mr. WRIGHTSMAN:

Q. Was there together with this mortgage as assignment of a fire insurance policy upon the house situated upon this land?

Mr. CLARK: Wait a minute. Objected to as immaterial.

Judge DALE: And not the best evidence, and incompetent.

The COURT: What is the purpose of that?

Mr. WRIGHTSMAN: I want to get a fact. That is not the best evidence I didn't know the gentlemen would be so technical about that phase of the case. I want to show the value of the fire insurance policy upon this house, as going to show the value of the house.

Mr. Clark: I submit that wouldn't show the value of the house.

The Court: I don't think it would, either. An assessment made by an assessor, and an adjustment made by an insurance agent is the poorest evidence on earth of the value of anything.

Mr. Wrightsman:

Q. Mr. Wagg, when you took a deed, at the time this mortgage was executed, for the purpose——

472 Mr. Clark: Wait a minute. I submit that has been gone all over.

The Court: Let him submit his question.

Mr. Clark: I thought he was through.

The Court: Oh no; you take up so much time.

Mr. Wrightsman:

Q. For what purpose did you take a deed at the time this mortgage was executed?

Judge Dale: Wait a minute. Objected to——

A. So that I could be the owner of the property——

The Court: Now wait. When he is objecting, you wait.

Judge Dale: Objected to as irrelevant and immaterial to any issue in this case.

The Court: Do you refer to the first deed, or to the second one?

Mr. Wrightsman: The first deed.

The Court: I understand it is stated in the pleadings that he took it as security for the mortgage debt. If I remember right, it is alleged both by the plaintiff and the defendant, isn't it?

Mr. Wrightsman: Yes.

The Court: Well, it is not necessary to prove it.

Mr. Wrightsman: I presume not; but there has been a good deal of evidence gone into by the other side that would be subject to objection.

The Court: There is no doubt but there is a good deal of it that is objectionable.

Mr. Wrightsman:

Q. Mr. Wagg, when did you first have any conversation with Mrs. Herbert of and concerning your business with her?

A. May, 1900.

473 Q. In May, 1900?

A. Yes sir.

Q. Where did that conversation occur?

A. At her house.

Q. Who was present, if anyone?

A. Leroy M. Drown, and R. J. Inge.

Q. What was the occasion of your visit to Cleveland at that time?

A. Non-payment of interest, and non-payment of taxes.

Q. What was the condition of this loan at that time, with reference to default in taxes or interest?

A. The taxes and interest were unpaid.

Mr. Clark: Objected to as not the best evidence.
The Court: Overruled.

Mr. Wrightsman:

Q. Go on, Mr. Wagg. What was the condition of affairs at that time?

A. The taxes and interest were unpaid, and it worried me so, I came down to look after it.

Q. Do you know about how much had accrued at that time? Did you go to school——

A. Let's see. In May there would be—a year from May, 1900—about a year and a half's interest, I think.

Q. About a year and a half's interest?

—. Yes sir.

Q. How much taxes did you understand was uncollected at that time, or do you recall the amount?

Judge Dale: Objected to as not the best evidence.

A. I think the taxes were——

The Court: Objection sustained.
Judge Dale: Wait a moment, Mr. Wagg.

Mr. Wrightsman:

Q. What negotiations did you have with Mrs. Herbert at that time, with reference to the paymebt of these taxes, penalties and interest? 474

A. Well, she consented for me to take the hay and apply it.

Q. State what conversation occurred between you and Mrs. Herbert at that time?

A. Regarding the taxes?

Q. Yes, all your conversation regarding your loan upon this land, and the taxes, and the payment of the interest. State fully what occurred.

A. I told her that I was down there to look after the property, seeing what conditions things were in. That I had a good deal of mental anxiety, being at a long distance, and I came down to see what the condition of things was. And that I had placed the deed that I took in escrow, to secure me in the ownership, as was agreed prior to my taking the papers, and in case of default of taxes, or default of interest, the property was to come into my possession, and as I had no notice that they couldn't meet those obligations, I didn't like it, and for that reason I placed the papers on record. If they had asked me——

Judge Dale: I object to that.

The Court: Is that what you said to her?
A. That is what I said to her.
The Court: Well, go on and tell it.
A. If they had asked me to extend the time, and showed a reasonable diligence in looking after their own interest, and not caus-

ing me such excrutiating anxiety as I felt when I got telegraphic notice that the taxes were unpaid, I should not have put the deed on record. I told her I didn't want the land, but I wanted the contract maintained. And I said, "I don't want to turn you out of house and home; I won't do that anyway; I won't do that if I lose
on it. And I there and then agreed that I wouldn't turn
475 her out if I lost on it. I had learned what kind of a man
her husband was, that he didn't support her properly, and
that he was a worthless fellow——

Mr. CLARK: Wait a minute.

Mr. WRIGHTSMAN:

Q. Go on and state the conditions there.

A. I made that pledge to her as a matter of courtesy to a woman that I believed to be worthy at that time. And she said that I might have the hay to apply on the indebtedness, and the hay was taken and applied on the indebtedness.

Q. Did you at that time tell her that you had come to take possession of this land?

Judge DALE: Wait a moment. I object to that, as leading and suggestive.

A. I did not take possession.

Judge DALE: Wait a moment. Objected to.

Mr. WRIGHTSMAN: I withdraw the question.

Mr. WRIGHTSMAN:

Q. What did you say at that time, if anything, in the matter of taking possession of this land?

Judge DALE: Objected to as immaterial, and irrelevant.

The COURT: Overruled.

A. I guess I told her that the land belonged to me, that I considered that the land belonged to me. But I didn't take possession of it. I left her in the entire possession, just as she had always had. I did ask Mr. Drown, afterwards, to look after it, and see that things were properly cared for.

Q. For what object——

Judge DALE: Oh, I object to that.

A. For the preservation of the property.

Judge DALE: Mr. Wagg, when I make an objection, I wish you would wait.

A. I didn't hear the objection, Judge. I don't hear as good as some.

476 Mr. WRIGHTSMAN:

Q. Did you at that time, upon this visit of yours, do any act of and concerning the exercise of possession to this eighty acre tract of land?

Judge Dale: Objected to as incompetent, and calling for a conclusion.

A. The only act I remember of——

Judge Dale: Wait a minute.
The Court: Objection overruled.

Mr. Wrightsman:

Q. Go ahead.
A. The only act that I remember of was to walk down across the field to her house, and pay her a visit, and the second visit I paid at her special request.
Q. That was the next morning, was it?
A. Yes sir.
Q. What occurred at that time?
A. I think what I have told occurred partly one day, and partly the next. I couldn't separate it, probably.
Q. What did she say to you at that time, if anything, in reference to her right of redemption of that place, or any claim she might have had to it?

Judge Dale: Objected to as leading and suggestive.
Mr. Wrightsman: I am directing his attention. I want to be specific, and not sail around.
The Court: You may direct the witness's attention to the conversation, so you don't put the question in the form of an answer.

A. She said that she had consulted, or conferred with a gentleman in Pawnee, in whom she had confidence, or words to that effect, and the- he had told her, that a deed in escrow did not convey the proper title of a deed, and Mr.——

477 Mr. Wrightsman:

Q. What did you say to her?
A. I remarked to her that I didn't think a man that would give that kind of advice, knowing how the deed came into my possession, with the clear understanding that was made before I made the loan or took the deed, and the letters which I had written, and which are in my copy book, specifically stating that the land was to be mine in case of the lapse of the contract, I didn't think that the man that gave advice of that kind was a friend of hers; that was my opinion.
Q. Now, what was said at that time between you and her, in reference to the payment of the past due indebtedness, and the taxes, as to when it might be paid?
A. I think she said they expected to have some money, and she would pay it out.
Q. Where was Herbert at that time, or were you informed?
A. She informed me that he was in Wichita, Kansas. I went to see him on my return.
Q. Did you see him?
A. I called at the hotel that they gave me the address of, and

found that he was a caller there for his mail, but that he boarded outside, in a boarding house.

Q. You made search for him at Wichita, and failed to find him, did you?

A. Yes. They didn't know where he lived, only that he boarded outside, in a boarding house somewhere.

Q. Then where did you go?

A. I went home.

Q. To Appleton, Wisconisn?

A. Yes sir.

Q. Did you at the time of this visit, in your own behalf, or through any other person, take possession of this land?

478 Judge Dale: Objected to as incompetent, and calling for a conclusion. He has been over that three or four times.

The Court: Yes.

Mr. Wrightsman: Did you do anything else, other than what you have stated here, in the matter of this land?

A. That was all, that I remember of now.

Q. Well, did you get the taxes, and the money that she promised would be raised shortly afterwards?

Judge Dale: Objected to as incompetent, irrelevant and immaterial.

A. I never received a cent, from the beginning.

The Court: Objection overruled.

Judge Dale: We have not claimed to have paid it; and we have not denied that he paid it; and the only controversy in regard to money, as I understand it, is as to the value of this hay crop.

Mr. Wrightsman:

Q. Was an accounting given you, or a statement given you with reference to the proceeds from this hay crop?

Judge Dale: Objected to as immaterial, and irrelevant.

A. It was given me in writing, yes sir.

The Court: Objection overruled.

Mr. Wrightsman:

Q. Do you recollect the amount of it.

A. Yes, very closely.

Q. Sir.

A. Very closely, yes.

Q. How much?

Judge Dale: Objected to——

A. It was about ten dollars——

The Court: Wait a moment. You say it was rendered in writing. That is the best evidence.

479 Mr. Wrightsman:

Q. You say it was rendered to you in writing?
A. Yes sir.
Q. That is here, isn't it?

Mr. Biddison: No, it is not here.

Mr. Wrightsman: I believe it is the understanding that everything that is not here is lost?

Judge Dale: How would it bind us, any report made to him about this hay crop?

The Court: The report wouldn't bind you, but what he got out of the hay you might be entitled to credit for.

Judge Dale: We would be entitled to the value of the hay, if we recover in this action. We have sought to show the value of it.

The Court: I know you have, and they are seeking to show it now, in another way.

Judge Dale: But their agent has testified fully in reference to the disposition he made of the hay, and they are bound by that.

The Court: He didn't state what the amount was.

Judge Dale: Yes, he stated it exactly.

The Court: No, I excluded it.

Mr. Wrightsman:

Q. How much did you receive?
A. About twelve dollars.
Q. With reference to getting this hay from Mrs. Herbert, did you suggest it to her first, or she to you, that you could have the hay to apply upon this indebtedness?
A. Well, I think I suggested it first.
Q. What was the manner of your language to her in that regard?
A. My language was always courteous.
Q. I mean give in substance what you said to her.
A. That under the circumstances I desired to have the hay, the value of the hay, placed against the indebtedness.
480 Q. Did you use any words of oppression?
A. No sir.
Q. Or anything in the nature thereof?

Judge Dale: I object to that.

Mr. Clark: Calling for a conclusion.

The Court: Well, what he said is competent.

Mr. Wrightsman:

Q. After this visit in Cleveland, what occurred between you an Mrs. Herbert? This correspondence that has been read here i evidence?
A. Some of it, yes.
Q. Did you receive from Mrs. Herbert at any time a letter makin a tender of payment to you of the amount of this mortgage indebted ness, interest, and taxes?

Mr. Clark: Wait a minute.

A. No.

Mr. **Clark**: Wait a minute. We object to it, because it calls for the contents of a written document, and also calls for a conclusion on the question of tender.

The **Court**: It calls for a fact, whether he ever received any such letter.

Mr. **Clark**: Whether he ever received any letter on the subject would be all right.

Mr. **Wrightsman**:

Q. What is your answer?

A. No. I never received such a communication.

Q. With reference to the time when you obtained a deed to this land from Mrs. Herbert, in May, 1901, did you have an opinion then as to the value of this land? Answer yes or no.

Judge **Dale**: Objected to——

A. Yes.

Judge **Dale**: Wait a moment. Objected to as incompetent, irrelevant and immaterial.

481 Mr. **Wrightsman**: It goes to the good faith of the transaction on the part of this witness.

The **Court**: Objection overruled.

Mr. **Wrightsman**:

Q. State what that opinion was at that time?

Judge **Dale**: Objected to——

A. That opinion was based on three items——

Judge **Dale**: Wait a moment. Objected to as incompetent, irrelevant, and immaterial. The testimony is incompetent to serve any purpose in this case?

The **Court**: Overruled.

Judge **Dale**: Note an exception.

A. I might say there was more than three sources of information.

Mr. **Wrightsman**:

Q. Go ahead.

A. First, on my visit to Cleveland in May, 1900, I priced land quite extensively, townsite land, and farming land both. Then I had the statement from Mr. Litten, the bank cashier there——

Q. Which was read in evidence here?

A. Which was read in evidence, and is there on the table, valuing the land at twenty-five dollars——

Judge **Dale**: I object to that.

Mr. **Wrightsman**: The basis of his information.

Judge **Dale**: That is not the statement of Mr. Litten in that letter.

Mr. **Wrightsman**: I object to the statement of the gentleman.

The **Court**: Let him go ahead and make the statement.

A. I had the letter in my possession at that time. I found plent that I could buy there for eight and ten at that time. I had my ta receipts, which I paid taxes on, and I had a letter from Mr. Eagle ton, stating that the railroad would not——

482 Mr. Clark: Wait a minute. I object to the statement o the contents of that letter.

Mr. Biddison: We submit that letter is already in evidence. It i referring to a matter in evidence.

A. Stating that the land was worth about twelve dollars an acr

Judge Dale: There isn't any such letter as that here.

A. Yes, I turned it in.

Mr. Clark: It is one we have demanded, and not been able t get.

Mr. Wrightsman: We have tendered all the letters whatsoever i our possession.

The Court: I don't think there has been any such letter read, tha I remember.

A. He also in that letter stated as a basis of his valuation——

Judge Dale: Wait a moment——

The Court: Don't state what he said in the letter.

Mr. Wrightsman:

Q. Now, it was upon that information that you have this opinion

A. That was my basis of opinion, yes sir.

Q. Well, now, state what the value of that land was at that tim according to your opinion?

Judge Dale: Objected to as incompetent.

Mr. Wrightsman:

Q. At the time you got this deed, in May, 1901.

A. I thought——

The Court: He may answer it.

Judge Dale: Note an exception.

A. Can I answer?

The Court: Yes sir.

A. I thought twenty or twenty-five dollars was enough.

Mr. Wrightsman:

Q. For what purpose did you desire a statement, or require statement from Mrs. Herbert as to the fact that her husban had departed? 483

Mr. Clark: Wait a minute. That is objected to, for the reaso that he gave his reasons at the time, and they are in writing.

Mr. Wrightsman: I don't know that there is any letter her covering that proposition, except submitting the form.

Mr. **Wrightsman**:

Q. What was your object in making such a request upon her?
A. It was to protect my interest against Herbert, in case he should turn up.
Q. Why did you not keep—Why did you not lay claim to the eighty acres of land under your first deed, and to her exclusion?

Judge **Dale**: Objected to as immaterial, and irrelevant.

Mr. **Wrightsman**: Answer the question. Why didn't you exclude her from the eighty acres of land under the first deed?
A. Because of my feelings of mercy and charity for her, and her situation, and I didn't want the land; and I didn't want anything that didn't belong to me; was one reason.

Mr. **Wrightsman**:

Q. Did you, at any time, directly or indirectly, do anything to oppress her, of and concerning this transaction?

Mr. **Clark**: Wait a minute.

A. Never.

Mr. **Clark**: Wait a minute. Objected to, as calling for a conclusion.
The **Court**: Objection sustained.

A. Many times I have——

Mr. **Clark**: Wait a minute. The Court has sustained the objection.

A. Excuse me.

484 Mr. **Wrightsman**:

Q. How long a time was the amount of this loan, at the request of Herbert and his wife, set aside for such purpose?

Mr. **Clark**: Wait a minute. That is objected to as incompetent and immaterial.
The **Court**: Objection sustained.
Mr. **Wrightsman**: Exception. That is all. You may cross examine.

Cross-examination by Judge **Dale**:

Q. Mr. Wagg, the first time you ever saw Mrs. Herbert was in May, 1900, was it—June?
A. May.
Q. What time in the month of May?
A. Early part of the month of May.
Q. You wrote a letter before this loan was made, in which you stated the terms and conditions upon which the loan would be made, did you not?
A. Yes.
Q. In that you stated that one year's interest would be taken out in advance, and that no further interest would be due until one

year after the expiration of the first year, or at the end of the secon year, did you not?

Mr. **Wrightsman**: Wait a minute. Objected to, for the reaso that the letter is the best evidence.

Mr. **Biddison**: And the additional reason, if the court please, th the final contract is a conclusive proposition.

The **Court**: Well, don't confuse the court on it. Let him answe the question.

Mr. **Biddison**: Exception.

485 Judge **Dale**:

Q. You wrote that letter, didn't you?

A. I wrote a letter, but what you have on file there is not complet

Q. Where is the complete letter?

A. In the copy book.

Q. Which copy book is it?

A. I don't know that I remember now.

Q. Do you know the number of the copy book?

A. No, I don't, I think I can find it.

Here the witness examines the copy books.

A. Here is the letter.

Q. Just read that, Mr. Wagg, please.

Thereupon the witness read the same as follows, to wit:

Appleton, Wis., *Sept.* 15*th*, 1898.

W. H. Herbert, Cleveland, Okla.

**Mr. Dear Sir**: Yours of the 12th at hand and its satisfactory a fair declaration to do, and I have began to see something of t drift of things. If you was in Wisconsin I would not hesitate moment. I have no love for such men as you described and woul not. I hace been made to hesetate on account of the possible futu contingencies. I wrote Mr. Drown about a deed held in escro against the possible interference or injunction proceedings th scheming men and lawyers trump up. I will bring the matter to focus at once and make the loan or quit and call it off.

You execute a warrantee deed to me to be placed in escrow an held by the Bank of Cleveland or A. A. Drown in trust for t
fulfillment of the terms of the mortgage in case you fail
486 fulfill the terms and are in default of interest or other term
for 6 months; then the deed is to be delivered to me or m
order. The mortgage is for $1000.00. I will deduct the first year interest, $100 and send $900.00 to the bank with instructions. Th pays 1st year's interest. The second year's interest is not due unt the end of the second year and six months' grace on the end of th makes a full 2½ years before you allow or I can ask for the de in case of default of contract.

I do this solely in the interest of protecting myself against i junctional and interference proceedings from interlopers and blac mailers—in case such an unpleasant thing as foreclosure proceedin should ever be necessary. I do not expect such a thing will ever occur. If I did no loan would be made, but I am now looking to the extreme of the case, and its easiest protection for me. You can ask Mr. Drown how I deal with men. I never knowingly distressed a man and am not inclined that way but want contracts lived up to.

The papers you executed have not arrived here as yet to my knowledge. They will be all right when completed and I have examined them and all that will be necessary is to execute the deed in connection with them and place in the hands of the trustee as indicated above for the purposes named. I trust this will meet your needs. On execution of papers you can have money.

S. R. WAGG."

A. The taxes were unpaid more than six months.

Judge Dale:

Q. Wait a moment. Where in was the copy which I called your attention to as having been read here, different?

A. The copy that Mr. Clark read didn't say anything about the lapse of taxes. I don't know whether he skipped that, but
487 when I heard him read that, that was left out.

Q. Did your letter here say anything about the lapse of taxes?

A. It does. Parts of the contract, which are taxes, mentioned in the deed.

Q. Now, at the time you wrote that letter, was it your intention to carry out, in good faith, the terms of the letter?

A. It was, and I done it, too.

Q. And under the terms of that letter, no interest was due for two years, was there?

A. Not if the terms of the contract were lived up to.

Q. Now, what do you mean by that?

A. I mean that he violated his contract, and did not pay his taxes.

Q. Is that the only reason why you claim that made the interest due one year before it was stated in the letter it should be due, his failure to pay those taxes?

Mr. Biddison: Wait a minute. The maturity of the interest is determined by the mortgage that was finally signed.

The Court: Well, let him answer that.

A. If the taxes had been paid, I should not have asked for the interest, because I had already extended the interest.

Q. You had done that?

A. Yes, I had. The letter was in the book.

Q. And you intended that letter as an extension of the interest payment?

A. I will find a letter in my book there——

The Court: Another letter than this?

A. Another letter; about a year later.

Judge **Dale**:

Q. Do you remember the date of that letter?

A. I recorded the instrument, because the taxes were unpaid.

488 Q. Wait a moment, now. I am not asking you anything about that. This letter which you say was written subsequent to this, do you remember what time that letter was written, extending the time of the payment of the interest?

A. Well, it was just a little while; just about the time the interest was due.

Q. There was no interest due until one year after the execution of the mortgage?

A. Well, yes, there was, under the contract. I want to explain; it has not been explained to the court. That is, when I took this loan, I sent two copies of two deeds, with different terms of payment, and Mr. Herbert took his choice, which he would have, and the other was returned to me unused. The one he selected was placed on record.

The **Court**:

Q. Do you mean the deeds, or mortgage?

A. The mortgage.

Judge **Dale**:

Q. In this letter here, you have stated that you would not be entitled to that escrow deed for two and a half years, did you not?

A. If he had kept his contract——

Mr. **Wrightsman**: Wait a minute. It is shown by the testimony of the witness that there are later letters.

Judge **Dale**: I don't believe it. Now you produce them.

Mr. **Biddison**: You produce*d* them.

Judge **Dale**:

Q. As a matter of fact, the mortgage was executed, do you remember what date?

A. I think it was the 24th of October.

Q. October 24th, 1900. Now——

A. 1898.

Q. 1898. Now you took out one year's interest in advance?

A. That was in the contract, yes.

489 Q. Well, you did take that, did you?

A. Yes.

Q. You got that?

A. Yes.

Q. Now, the next year's interest, under your letter, would not be due until October 24, 1900, would it?

Mr. **Biddison**: Objected to as calling for a conclusion.

The **Court**: He may answer the question.

Judge **Dale**:

Q. What do you say to that?

A. Under the letter?

Q. Yes.

A. Well, that would depend on the circumstances. The letter is very clear. If he failed in any parts of the contract, the deed was to go on record, and he did fail.

Q. Why did you wish to put that deed on record?

A. I don't know. I have wished a hundred times I never had.

Q. Why did you wish to put it on the record?

A. I had no clear idea as to that. I thought it would secure me more strongly than the mortgage.

Q. Now, as a matter of fact, you thought the deed gave you title to this land, did you not?

A. Yes, if I had not had the deed, I should certainly have foreclosed right out; certainly.

Q. When you were there at the Herbert place in May, 1900, and had that conversation at that time, you believed that the deed which you had taken, the escrow deed which had been taken and recorded, gave you the absolute title to that land, did you not?

A. Yes, I thought it gave me title at that time.

Q. And at that time, in this conversation with Mrs. Herbert, you told her the land belonged to you, did you not?

489½ A. Substantially that.

Q. And that was your idea at that time?

A. That was my idea at that time, yes.

Q. Now, you have always thought that, have you not, until this lawsuit came up?

A. No.

Q. Did you not, before you got the second deed,——

A. How is that?

Q. Did you not, in your letters to Mr. Drown, before you got the second deed, state that the land was yours?

A. Well, I thought the deed gave me a pretty good title.

Q. And you always thought that until you got the second deed?

A. I thought it was good title, but I had somewhat modified my views.

Q. Well, you have modified them now?

A. As to the strength of the deed. And before I done any further business, I talked with my lawyer, and he said, "Mr. Wagg the best way is to bring things right down to date; Mrs. Herbert make you a deed, and you deed back to her, and have everything settled right down to date.

Q. You always thought, Mr. Wagg, notwithstanding that, that this deed which you parties agreed should be placed in escrow, gave you the title and right to the possession of that land, didn't you?

Mr. **Wrightsman**: Don't answer the question. Objected to as a reiteration, and having been asked and answered, and calling for a conclusion.

The **Court**: Overruled.

Mr. **Wrightsman**: Exception.

Judge Dale:

Q. Answer the question. Read him the question.

Thereupon the question was read by the stenographer.

A. No, not always.

490 Q. I mean up until after the second deed. You had that idea in mind when you went there in May, 1900, didn't you.

A. I had in May, 1900.

Q. And you had it in May, 1901, didn't you?

A. Not as strongly, no sir.

Q. You expressed yourself that way in those letters, didn't you?

Mr. Wrightsman: Objected to as calling for the contents of those written letters.

Judge Dale: I have a right to.

Mr. Wrightsman: I submit no more right than we had.

The Court: Objection sustained.

Judge Dale: Exception.

Judge Dale:

Q. Now, at the time you wrote those letters to Mr. Drown in January and February, 1901, just prior to making that deed, where in you stated that that land was yours, that you had paid for it, you believed that, didn't you?

A. Yes.

Q. You believed that to be true at that time?

A. Yes, and I had a positive agreement with Mr. Herbert that the land was to be mine; no question about it.

Q. And you acted, and felt that it was yours?

A. I had discovered that Mr. Herbert was no man of his word.

Q. Well, I say you acted and felt just as if that land did belong to you?

Mr. Wrightsman: Wait a minute. Objected to——

A. If I had been dealing with straight, honorable parties, it would have belonged to me.

Judge Dale:

Q. That was your idea?

A. Yes sir.

Q. And it is your idea now?

491 A. Yes.

Q. That by reason of the giving of that deed, the land ought to have belonged to you, that is your idea, isn't it?

A. Well, that is a matter of law, and not of my opinion. My opinion has sometimes been wrong, and in this case it was not as I expected to find it always, and for that reason I modified my opinion, and modified my action.

Q. You went there for the purpose of getting that hay, didn't you?

A. How is that?

Q. You went there to see Mrs. Herbert, and one of the purposes was to try and get that hay, was it not?

A. I didn't know as I thought of the hay until I got there and saw it.

Q. You thought of it then. Well, now——

A. I didn't want any hay. I wanted my interest, and my money.

Q. But in lieu of that, you wanted the hay, didn't you?

A. I wanted to get something.

Q. And you told her, inasmuch as you had taken that deed and recorded it, that you were in possession of that land, and that hay crop?

A. I presume I said so.

Q. Now, I will ask you if she did not tell you at that time, or the next day, in conversation, that the hay could be sold for a dollar an acre, as it stood upon the ground?

A. I don't think she said anything to me about it.

Q. You had a talk with her about the value of the hay?

A. I don't think she said anything about that.

Q. Didn't Mr. Nash tell you that?

Mr. WRIGHTSMAN: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

492 The COURT: Objection sustained.

Judge DALE: Why, if the court please?

The COURT: What Nash told him I don't think is material.

Judge DALE: Nash's offer, I said; his offer for that hay.

The COURT: If Nash made him an offer to buy it at that price, that is a different proposition.

Judge DALE: That is what Mr. Nash testified to.

Judge DALE:

Q. You had a talk with the witness Nash, did you not?

A. I don't know that I ever saw him until this morning.

Q. Will you say that you did not?

A. I don't know that I ever saw him.

Q. Is that the only answer you wish to make?

A. I don't recall that I ever saw him.

Q. Do you say he did not offer you a dollar an acre for that hay?

A. No sir, not to my knowledge, he never offered me anything.

Q. Didn't you direct him to go to Mr. Drown and make a deal with Mr. Drown?

A. I don't know that I ever saw him.

Q. Is that the only recollection you have of the whole thing, that you don't remember? Do you want the court to understand that you didn't have it, or that you don't remember?

A. I want the court to understand I don't have any recollection of Mr. Nash ever saying anything to me, or my ever seeing him before.

Q. You saw him here while he was a witness.

Mr. WRIGHTSMAN: Wait a minute. Objected to.

The COURT: Objection sustained.

Judge Dale:

Q. Now, do you know anything about the value of the hay crop down there?

A. No.

Q. You know nothing about that, except what you have been told?

493 A. No, nothing to amount to anything; nothing to give an opinion on.

Q. Now you have spoken about the price of that land. You knew the values of land were going up there, didn't you, steadily?

A. I had no tangible evidence of it.

Q. That is not the question. You knew it, didn't you?

A. All the tangible evidence I had was against any prices going up; up to the time the land was platted.

Q. Then it went up, did it?

A. Well, it advanced about that time.

Q. About the time it was platted?

A. About the time the railroad got in there.

Q. You wrote this letter which has been read in evidence, of October 15, 1900, the copy of it here?

A. Well, I suppose I did. I can tell better when I hear it read, or see my signature.

Q. Now, on October 15, 1900, I find in your copy book, at page 155, the following language: "On the Herbert matter go slow until November first. After that time we will make a deal with interest at figures named by you, and I will go one-half with you if you desire it." What did you mean by that?

A. You wish me to explain?

Q. Yes.

A. Explain the whole mater?

Q. Explain what you meant by that?

A. Well, as near as I remember now, Mrs. Herbert was soliciting a division of the land, and I thought she wanted more than the value would justify. Roy was negotiating to get me to raise the acreage, which I was willing to allow her to take, but I thought he was giving too much for her; I was afraid I would make a loss, and I requested, I think, for some convenient reasons, the post-494 ponement of the thing we were considering for a little while; and I had told him that if he made a satisfactory settlement with Mrs. Herbert, that I would give him a chance to take half the land, and work it out, and get the balance of my money out of it; and he could have it for seven hundred dollars, and he work out the balance of my money, in any way he saw fit, and he suggested, I think, platting it.

Q. Now, I find this further in this letter: "Remember all the increase in value don't belong to Mrs. H. It is my land now." Now what did you mean by that? That she was not entitled to the increase of the value of the land, that you were entitled to it?

Mr. Wrightsman: Let the witness answer it, without arguing it.

A. Well, I thought possibly my waiting, and trouble, etc., I was entitled to some of the increase. That is a fair inference. I don't know just what I did think at that time.

Judge DALE:

Q. You recognized, then, did you, that the land was increasing in value, and had increased in value very materially from the time you made the loan?

A. I would have been in bad shape if it hadn't increased in value.

Q. You recognized it had increased in value, did you not, up to the time you wrote this letter?

A. Well, I don't think I considered it increased very much.

Q. Then, why did you say——

A. Because Mrs. Herbert had been trying to sell it, and couldn't.

Q. Why did you say, then, "Remember all the increase in value don't belong to Mrs. H. It is my land now."

A. I always instructed Roy to give Mrs. Herbert every courtesy and consideration we could give her, and a nice piece of the land when we settled. And I didn't want to take the land at
495 any time. I wanted Mrs. Herbert to sell it, and I told her so repeatedly——

Q. But didn't you——

Mr. WRIGHTSMAN: Let the witness answer.

Judge DALE:

Q. Go ahead, if you want to.

A. What place did I stop?

Q. Well, I guess I will call you off on that. I will ask you Mr. Wagg, why it is, if, as a matter of fact, you knew the land was increasing in value, why did you think the increase belonged to you? Answer that question. What reason had you for thinking you were entitled to this increase of value?

Mr. BIDDISON: Objected to as having been asked and answered.

The COURT: He answered that a-hile ago. He said he thought on account of the trouble and delay he had been put to, he thought he ought to have a part of it.

Judge DALE:

Q. You thought and felt, did you not, that all you were called upon to do was to treat her fairly and liberally?

Mr. WRIGHTSMAN: Objected to as immaterial.

Judge DALE: I don't think it is, under the law. I don't think he had any option in a matter of that kind, under the decisions of the Supreme Court of the United States.

Mr. WRIGHTSMAN: It is a matter anterior to the settlement.

The COURT: You don't think he was going to treat her fairly?

Judge DALE: I want to know if that was his idea about this transaction.

Mr. WRIGHTSMAN: I withdraw the objection.

Judge DALE:

Q. Is that your idea that you had a perfect right to treat her, on the terms you——

Mr. WRIGHTSMAN: Objected to.

A. State the question again.

496 Judge DALE:

Q. Did you, at the time you wrote, this letter, believe you had the right to determine upon what terms you would settle with her?
A. No.

Mr. WRIGHTSMAN: Wait a minute. Objected to.
The COURT: Objection overruled.

Judge DALE:

Q. You didn't believe you had the right to determine those matters?
A. I didn't exercise that right.
Q. I asked you if you thought you had the right?
A. I won't say that I had the right to do anything; no.
Q. Well, did you think you had the right to settle on the terms upon which you would settle with her?
A. Only in a mutual way; only by mutual agreement. And I negotiated through Mr. Drown, because I could do business faster through him than through Mrs. Herbert.
Q. Now, you say you propose to treat her fairly. Now, did you think at that time you had the right to determine this contract between you, how it should be settled?
A. No sir, not absolutely.
Q. Not absolutely?
A. No.
Q. Well, let's see. You say here, "My mind now is fifteen to twenty acres and the house would be a liberal gift, and afford her and the boys more than they would get from most anybody else under similar conditions." Now, at that time you had the idea in mind, did you not, when you wrote that letter, that it was for you to say how much she should receive?

Mr. WRIGHTSMAN: Wait a minute. Objected to as argumentative.
Judge DALE: No, it is not. I insist that is right in line with the decisions.
497 The COURT: He may answer.

A. No, that opinion was modified by the things I done in behalf of Mrs. Herbert.

Judge DALE:

Q. I say when you wrote that letter. I am not asking you about any modification. When you wrote this letter you had in mind just exactly what you say there, that you would treat her liberally?

A. I meant to treat her liberally.

Q. But you should determine what that liberal treatment should be?

A. No, when a reasonable condition was presented to me, I modified my treatment.

Q. You proposed to be as good to her as others, under similar conditions?

A. Better.

Mr. WRIGHTSMAN: Don't answer the question. Objected to as argumentative.

Judge DALE:

Q. Now I will read in the same letter; "If things had gone down, I would have been left to hold the bag, and pocket the loss. Now there is a rise they whine and squirm, and want all there is, and talk about justice and charity." Now it was your idea when you wrote that, was it not, Mr. Wagg, that they were not entitled to all the raises in values?

Mr. BIDDISON: Objected to as irrelevant and immaterial.

The COURT: Overruled.

A. Under the harrassing conditions under which that loan was carried, I was sometimes greatly aggravated.

Judge DALE:

Q. Well, that was your idea, was it?

Mr. WRIGHTSMAN: Let him answer.

A. I was greatly aggravated, and I did not always feel even-tempered, and I sometimes wrote a letter under those conditions.

498 Judge DALE:

Q. Well, now, you felt, did you not—I am not speaking about that language, particularly. I don't care anything about that.

A. I felt, if a man would give me a thousand dollars, I wouldn't go through what I had been through.

Q. That is not what I asked you, and it was not with reference to your particular feelings, but I asked you if you did not believe at that time that Mrs. Herbert was not entitled to this raise which you speak of here?

A. I was guarding against a loss, and I thought Roy was asking a good deal for her; more than she was entitled to; but Roy presented good reasons for increasing the amount, and I increased it.

Q. Now, Mr. Wagg, I am trying to get at the state of your mind. I want to know if, at the time you wrote that letter and used that language, you felt that you were entitled to some of this rise in the value of that land?

Mr. WRIGHTSMAN: Objected to as having been asked and answered several times.

Judge DALE: I don't think it has been answered at all.

The COURT: Overruled.

Judge Dale:

Q. Answer the question.

A. That I was entitled to some of it? I have answered the question once.

Q. Well, just answer it once more, and say whether or not you thought you were entitled to a portion of this raise in value?

A. I thought all the trouble I had with this loan, and carrying it without interest, and paying the taxes, and all this harrassing I had endured, and surrendering the mortgage before it was matured, I was entitled to a little something for doing it.

499 Q. You wanted a part of the raise in the land, that was it, did you?

A. I would get my compensation out of a little better price, yes.

Q. You felt pretty sore towards Mrs. Herbert, did you not, and Mr. Herbert?

A. How is that?

Q. You felt pretty badly towards Mr. and Mrs. Herbert, did you not?

A. I felt like any other creature that was abused.

Q. And you felt pretty seriously-minded towards her, as well as her husband, did you not?

A. I felt better towards her than I did towards her husband.

Q. Now, Mr. Wagg, why did you conceive the idea that you had the right to deed a part of this land to her children, if this loan was paid off?

A. Well, the representations made to me in Cleveland at the time I was there, or afterwards, I don't remember which, Herbert would scheme his wife out of it, if it was in his wife's name. And his children—it would do them some good; I suggested that.

Q. You thought, did you not, that you had a perfect right even if this loan was paid, to determine how that land should be divided, or deeded by you?

A. No sir, I didn't care much about it. I was simply suggesting it for her benefit. It made no difference to me.

Q. You saw her, did you not——

A. Oh, I suggested that in kindness for her; thought it might save her something some time. The fact that I did finally deed it all to her is evidence I was willing to modify my opinion on that.

500 Q. Now, Mr. Wagg, I believe you stated that you didn't think that the land had increased in value down there very materially?

A. I had reason for thinking that way.

Q. You had reason for thinking it had increased in value?

A. It had not.

Q. Why in this letter do you refer to that, and want a part of the raise?

Mr. Biddison: Objected to as argumentative.

Mr. Wrightsman: And having been asked and answered.

The Court: I think it has been gone over sufficiently.

Judge **Dale**:

Q. Now, Mr. Wagg, when was it Mr. Drown first told you he would give you seven hundred dollars or wrote you he would give you seven hundred dollars for a half interest in this property?

A. I don't remember when it was.

Q. It was some time during the summer of 1900, was it not?

A. It was later than that. It was after Mrs. Herbert began to negotiate for a division of the land.

Q. The last letter I read to you, called to your attention, was October 15, 1900, was it not?

A. I don't recollect just what the date was.

Q. Now, did you send him some contracts to that effect?

A. I think I did send him a contract.

Q. Did he ever return it?

A. No.

Q. He went ahead, did he not, under that contract, and disposed of a great many of these lots, or most of them?

Mr. Biddison: Wait. If the court please, we object to that. He went ahead under that contract,—which the testimony is, never was executed.

501 Judge Dale:

Q. Well, under the agreement. I understood from these parties that they carried out the terms of the contract. What were the terms of the contract submitted at that time?

Mr. Biddison: Objected to as not the best evidence.

The Court: Objection sustained.

Judge Dale:

Q. You had an agreement with Mr. Drown by which he took charge of this matter, did you not?

A. Do you wish me to state what conditions he worked under?

Q. I asked you if you had an agreement with him by which he took charge of the sale and disposition of this Wagg Addition?

A. I can answer that by stating the conditions he worked under.

Q. Did you have any agreement with reference to it, of any kind; you had an agreement with him, did you?

A. I think we had a working understanding.

Q. Well, what was that working understanding?

Mr. Wrightsman: Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination? It is at a time way subsequent to this trade.

Judge Dale: I don't think so. I think it was way before the trade.

A. Roy never signed a contract, and never returned one to me. I was willing to pay him, but he never took any pay. I offered to pay him a commission on the sales. but he never took a cent.

Judge **Dale**:

Q. He never did?

A. Not that I know of.

Q. He never bought a half interest in the property?

A. Yes sir, he bought a half interest, and paid for it.

Q. How much?

A. Seven hundred dollars.

502 Q. When was that?

A. After the deed Mrs. Herbert signed had passed tween us.

Q. And he got a one-half interest in the property by virtue that?

A. Yes, sir, for seven hundred dollars.

Q. You say that all occurred after Mrs. Herbert executed second deed?

A. Yes, sir.

Q. Now, as a matter of fact, I will ask you if in March, 19 you wrote a letter, or about that time, to the First National Ba of this City?

A. It was in April; You will find it in April.

Q. Wherein you stated in that letter, that you had partly d posed of that land to Mr. Roy Drown. Did you write such a lette

Mr. Wrightsman: Wait a minute. Objected to, for the reas that the letter is already in evidence, and the best evidence.

Judge Dale:

Q. You recall writing a letter of that kind, do you?

Mr. Wrightsman: Objected to.

The Court: He can answer it.

A. I did write a letter.

Judge Dale:

Q. To that effect?

A. Yes, sir.

Q. And you also wrote one to Mr. Deem of that effect, did y not?

A. I think so.

Q. The one I read here?

A. I think so.

Q. Then, as a matter of fact, you had disposed of a part of t land at that time?

A. I had deeded the land to Mrs. Herbert prior to that time, a sent the deeds on.

503 Q. Well, this transaction was not closed up at that tin was it?

A. It was not in my hands.

Q. The deed by Mrs. Herbert was not made——

A. I mailed the deeds in March, and those letters to the ba were written in April.

Q. Well, you received a letter from the bank very soon after t first of March, did you not?

A. I received letters, but the letters asked such terms—not th I couldn't give any deed. They asked for Mr. Herbert's signatu is the best of my recollection.

Q. Where are those letters?
A. I don't know, I am sure.
Q. As a matter of fact, they didn't say anything about Herbert's signature, did they?
A. One of them, at least, mentioned Herbert's signature.
Q. You didn't mention*ed* that in your letter, did you?
A. I take that back. A good and sufficient title, they said.
Q. What difference did it make to you, so you got your thirteen hundred dollars?
A. I had already deed- the land to Mrs. Herbert, and signed the deeds, and sent them in the mail.
Q. When did Mr. —— receive them, do you know?
A. I don't know. You will find my letter there, in March; you can read it, if you please.
Q. You say before you received that letter from the bank, you had done that?
A. Yes, sir.
Q. Now, as a matter of fact, didn't you hold that letter up from the bank for a long time before you aswered it, and didn't you receive that letter before you sent those deeds which you have spoken of, and wait until after you had sent the deeds before you notified these parties at the bank?
504 A. No.
Q. Well, let's see. You say you did not?
A. I don't think so.
Q. You are certain of that, are you? Do you know what time in April, or March, you sent the deeds?
A. Well, it is in the copy book.

The Court: Gentlemen, I guess we will have to pass this over until 7:30 this evening.

Thereupon court adjourned until 7:30 o'clock P. M.

At 7:30 o'clock P. M., the hour to which an adjournment was taken, having arrived, all parties being present as heretofore noted, thereupon the following proceedings were had and done, to wit:

S. R. Wagg, thereupon resumed the stand, and his examination was continued as follows:

The Court: Proceed with the examination of the witness, gentlemen:

Judge Dale:

Q. Mr. Wagg, you stated before supper, I believe, that you had transmitted that deed prior to the time you wrote those letters to Mr. Deem and the First National Bank, refusing the thirteen hundred dollars, did you not?
A. I didn't quite catch the question.
Q. Read it to him.

Thereupon the question was read by the stenographer.

A. I mailed the deed on the 21st of March, 1901.

Q. The 21st of March?

A. 1901.

Q. That was the first deed you mailed, wasn't it?

A. Well, the letter will show what that is.

505 Q. Well, on May 10, 1901, I find here a letter from you to Mr. Drown, in which you state: "I enclose the Herbert deed to me, my deed to her, and contract to you. You sign both contracts, and return me one, properly signed before notary." That is correct, is it?

A. Those were the deeds sent on the 21st of March, that had gone to Cleveland, and had been laying there, before Mrs. Herbert, and then for some reason they were sent back to me, and then they were again ordered by Mrs. Herbert to be sent to Cleveland, and she would sign them, and they were so sent. They are the same deeds, the ones sent in March, and the ones sent in May; the same papers.

Q. Now, you wired to have those deeds sent back to you, didn't you?

A. After I had been notified she would not sign them.

Q. Do you remember what time you wired?

A. No, I do not; except the book might show.

Q. Now, at that time, you had received the deeds back; had you not, on April 21st?

A. How is that?

Q. When did you get those deeds back? When did you wire for them?

A. I don't remember.

Q. Can you fix approximately the time?

A. I have no record except the book.

Q. Now, you delayed answering, for some considerable time, the letter to the First National Bank, did you not?

A. Not that I know of.

Q. I find in your book here, under date of April 21, 1901, the following statement: "Your favor of the 28th at hand, inquiring about the purchase price of land at Cleveland, Oklahoma,
506 formerly owned by Mrs. Herbert, and now owned by the
writer. The time at which Mrs. Herbert had to make up, or find a buyer, had expired some time before any notice was sent me, and a partial sale had been made to Leroy M. Drown of Cleveland."

A. What is the date of that letter?

Q. April 21, 1901. Now, why did you delay answering that letter for that length of time?

A. Well, I don't know. I have no knowledge except what is in the record there, and that must answer for the conditions.

Q. Now, do you know what time you made this partial sale to Leroy M. Drown?

A. Well, the records there show. I think it began along in the fall.

Q. That is, you were dickering, you mean, with him?

A. Roy was dickering with Mrs. Herbert to bring about this trade printed in the deeds mailed on the 21st of March.

Q. Now, you say you sold him this land, or agreed to sell it to him, before Mrs. Herbert made the second deed?

A. No, sir, I didn't say so.

Q. What did you say about that?

A. I said after Mrs. Herbert was settled with, then I would let him have half of it.

Q. This was——

A. Mrs. Herbert must be taken care of first. You will find that always has been my procedure.

Q. Now, here is a copy of a letter from you, bearing date March 18, 1901, to Mrs. W. H. Herbert: "My Dear Madam, Your letter of March 5th came duly to hand. The option extended to you expired on the first of March." Now, do you say you transmitted those deeds before March 5th, those first deeds?

A. I didn't quite understand your question.

507 Q. You say you transmitted those first deeds on the 228th of March?

A. The 21st of March.

Q. Well, now, here is a letter to Mrs. Herbert, on March 5th, in which you state that: "On March 4th I sold to Leroy M. Drown, and it is our intention to deed you the house and a liberal piece of land in the early future?"

A. Well, those deeds——

Q. Well, now, had you sold a part of this land at that time to Drown?

A. Sold it?

Q. Yes.

A. No, sir.

Q. You state in this letter to her you had.

Mr. Biddison: Objected to as not the best evidence.

Judge Dale: I withdraw the question.

The Court: What is the date of that letter?

Judge Dale: March 18. The whole letter reads as follows: "Appleton, Wis. March 18th, 1901. Mrs. W. H. Herbert, Cleveland Oklahoma. My Dear Madam: Your letter of March 5th came duly to hand. The option extended to you, expired on the 1st of March. On March 4th I sold a part to Leroy M. Drown. It is our intention to deed you the house and a liberal piece of land in the early future. I think I can safely say Mr. Drown will accord you every courtesy and the most generous treatment in which I shall concur. Yours truly, S. R. Wagg."

Judge Dale:

Q. That was your letter, wasn't it?

A. Well, I presume it was.

Q. Now, you were telling her that you had sold this land to Leroy M. Drown on March 4th. Why did you do that, if you had not, in fact, done it?

A. Do you want me to explain?

508 Q. I want you to explain why you wrote to her that you had made this sale, if you had not, in fact, made it. What purpose had you in doing that?

A. I will explain that. As the letters will show, back in the Autumn previous Mrs. Herbert had expressed a desire to have a division of the land, and we didn't come to an agreement, but we did arrive at an agreement, where we agreed to give her twenty-five acres, and I had these deeds prepared and made up, and they were ready to send to her on the 21st of March, I think it was. Now, while these deeds were being made up, as agreed with her, and arranged with her, she had still continued negotiations with Mr. Deem and Mr. Sloan, and I don't know how many others, and this letter, I think, was one she wrote in saying she had made a deal with these parties while at the same time she had made a deal with me, and I had prepared the papers, and they were ready to go the 21st.

Q. Well, but this letter from her, advising you that she was ready to pay that loan, was received by you on March 5th.

A. But she had already agreed to take these papers, as I had made them up, and she did take them.

Q. You hadn't the papers made up at that time, had you, on the 5th of March?

A. Well, I couldn't say about that, I am sure. The option she had,—the arrangement she had to sell to outside parties, expired on the first of March, and if she did not sell to outside parties we were to carry out this deal.

Q. Now, you hadn't agreed at that time to give her twenty-five acres, had you?

A. Yes, I had, because I made the deeds that way. So there must have been an understanding of that kind.

509 Q. Your deed was not signed until the 21st of March, was it?

A. It was mailed the 21st, and usually it takes a few days to get things up, at best.

Q. You say to this court Mrs. Herbert had agreed with you, or Mr. Drown acting for you, at the time she wrote this letter stating she had raised this money, and which is dated, as you say, on the 4th day of March, do you say that woman had agreed at that time to take twenty-five acres and quit?

A. She had agreed to take twenty-five acres and quit.

Q. Where is the evidence of that fact?

A. I say so. And further than that, I never received any tender of any money; never; I would have taken it if I could have got it.

Q. Now, you say you sent the deed on the 21st of March?

A. Yes, the 21st of March.

Q. Now, on the 18th of March you wrote this letter to Mrs. Herbert, refusing the option?

A. Yes, but the papers were in process of preparation, and I presume were nearly prepared.

Q. Now, as a matter of fact, you didn't intend to give that woman an opportunity to buy that land at all, or to pay that mortgage off?

A. I certainly did.

Q. When did you conceive that idea?

**Mr. Wrightsman**: Objected to.

Judge **Dale**:

Q. Unless she would comply with your terms?

A. I think she got the same out of this deal as she would have
ot from the other folks.

Q. Well, that is your judgment. You took the fifty-five acres for
e debt, did you not?

A. Yes, I did.

Q. And at that time you were claiming thirteen hundred dollars, were you not?

A. I think it was thirteen hundred dollars at an earlier date than
at.

Q. Well, how much was there due upon that mortgage on March
1901?

Mr. **Biddison**: Objected to.

Judge **Dale**:

Q. Principal and interest.

Mr. **Biddison**: Objected to. The mortgage notes are the best
idence.

The **Court**: Well, he was claiming more than the note and mort-
ge, and evidently it was based upon something else.

Mr. **Biddison**: The question is not what was due him, but what
is due on the note and mortgage.

Judge **Dale**:

Q. Why did you claim more? On account of your mental dis-
ess and anxiety?

A. I have explained that twice.

Q. It was on account of your excruciating anxiety, is that right?

Mr. **Wrightsman**: Wait a minute. Don't answer that.

The **Court**: Objection sustained.

Judge **Dale**:

Q. Now, did you consider that excruciating pain that you were
ffering, and mental distress, worth six hundred and some odd dol-
rs extra, that you — exacting? Is that the reason of this?

Mr. **Wrightsman**: Objected to as incompetent, irrelevant and im-
aterial, and not proper cross-examination, and assuming addi-
nal facts.

The **Court**: Objection sustained.

Judge **Dale**: Exception.

The **Court**:

Q. What was the additional sum claimed for?

A. Did you ask a question, Judge?

Q. Yes, I asked you a question. Have you any itemized statement, or can you give me one, of what that sum was
ade up of,—a thousand dollars principal.

A. I haven't it with me now, but I can make you up one in the morning.

Q. Don't you remember now? Haven't you any memorandum from which you can give the items?

A. I couldn't do it now.

Q. Well, you know the items that went into it, don't you?

A. I could tell pretty near, but I want a little time to figure out the interest.

Q. Well, it was the principal of the mortgage, and accumulated interest. What else entered into it?

A. I made a trip from Wisconsin to Oklahoma to look after the property, when it lapsed in taxes and interest.

Q. Did you include the expenses of that trip?

A. Yes, sir.

Q. Did you include anything for your time?

A. No, sir.

Q. The taxes entered into it?

A. Yes, sir.

Q. Added interest on the taxes?

A. Yes, sir.

Q. Added interest on the interest.

A. Yes, sir.

Q. The interest was due?

A. Just according to the terms of the contract.

Judge Dale:

Q. The principal and interest amounted, on March 1st, to $1133.00, did it not?

A. I think it is more than that.

Mr. Biddison: Objected to as calling for a conclusion.

512 Judge Dale:

Q. How much taxes did you put into this?

A. My recollection is there was about sixty dollars. Two years. I think it is, about. Made about thirty dollars each year, with the extra expenses on the taxes.

Q. How much?

A. About thirty dollars each year. That is approximately correct.

Q. What was your railroad fare down here?

A. Well, I don't know. My expenses down here were some seventy dollars.

Q. Well, what else. Did you have anything else, now?

A. Somewhere between seventy and eighty dollars, all told. I had a long trip from Perry clear across to Cleveland, sixty miles ride over the roughest road that I ever went over.

Q. I agree with you there. Now, you didn't think this land was worth any more than about twenty-five dollars an acre, did you, at the time you got this deed?

Mr. Wrightsman: Objected to as incompetent, irrelevant and immaterial, and having been fully gone over.

The Court: Yes, you went over that.

Judge Dale:

Q. Do you remember writing a letter appraising that land at one hundred dollars a lot, five lots to the acre?
A. Oh, that was a jocular letter.
Q. You knew there was a good rise in it, didn't you?
A. That was a jocular letter. And I wish to say, now that you have asked of that letter, that Roy knew nothing of it. That was written on the impulse, after a talk with a real estate agent at home.
Q. Well, do you know about how much you and Roy got out of this property by the sale of these lots?

Mr. Biddison: Objected to as immaterial, and irrelevant.

A. Roy can tell you; I don't know. Roy kept the records; I don't know what they yeilded us.

513 Mr. Wrightsman: This was two or three years subsequently, Your Honor.
The Court: That is within the issues here.
Judge Dale: Mr. Drown swore he sold a hundred and fifty odd lots before the railroad was talked of.

Judge Dale:

Q. Most all of these lots were sold out very shortly after you and Roy platted this, were they not?
A. Roy could answer that question much better than I could.
Judge Dale: I suppose so. That is all.

Redirect examination by Mr. Biddison:

Q. Mr. Wagg, your attention has been called to a letter of date September 25, 1898, to W. H. Herbert with reference to depositing deed in escrow. I will ask you if Mr. Herbert ever signified to you in any way his acceptance of the terms of that letter?
A. No, sir.

Judge Dale: Well, we object to that, as immaterial. The letter is here. He didn't have to accept it. He sent it to them, and they didn't have to signify their acceptance. That was the conditions upon which he proposed to make this loan. I don't think it would necessarily have to be accepted.
The Court: No, not if he accepted the loan; if he attached the conditions to the loan, and accepted the loan.
Mr. Biddison: I want to go on and show that there were further communications on that subject.
The Court: Well, butt in.

Mr. Biddison:

Q. Was there any protest, or further suggestion to you in regard to that kind of an escrow deed?
Mr. Clark: Wait a minute. I submit if there was it ought to be in this correspondence. That is the best evidence.
The Court: Yes, that is true.

514 Mr. **Biddison**:

Q. I will ask you if you received any letter from A. A. Drown—I am preparing the foundation, to prove the loss of it—I will ask you if you received a letter from A. A. Drown upon that subject?

A. Yes.

Q. Do you know where that letter is?

A. It is in the copy book.

Q. The letter from A. A. Drown?

A. Oh, no. I don't know as I do know where the letter from A. A. Drown is. My answer is in the copy book.

Q. Do you recollect receiving a letter from him with reference to the Herberts interpretation of that escrow contract?

A. Yes, he wrote me a letter, saying——

Judge **Dale**: Wait a moment. We object.

Mr. **Biddison**:

Q. Have you made search for all your letters upon that subject?

A. I have, yes, sir.

Q. Have you been able to find or produce that letter?

A. I have not been able to find the one he wrote me, no.

Q. Was it in your possession the last you knew of it?

A. The last I knew of it, it was in my possession, but that was a good while ago.

Q. You don't know where it is now?

A. No, I do not.

Q. Did you look in the places where you usually keep your correspondence, for it?

A. Yes.

Q. Now, I will ask you what the substance of that letter was, upon the question of the Herbert's interpretation of the escrow, what the escrow should be?

Judge **Dale**: Objected to as incompetent, and no proper foundation laid.

515 A. He stated that Mr. Herbert——

Judge **Dale**: Wait a moment.

The **Court**: Wait until he gets through with his objection.

Judge **Dale**: I object to it as incompetent, no proper foundation laid, and irrelevant and immaterial, and not as coming from Mr. or Mrs. Herbert.

Mr. **Biddison**: We will get to that proposition, that the response to it was direct to Herbert, was sent to Herbert.

Judge **Dale**: We have that letter here.

Mr. **Biddison**: Yes, sir, that letter is here.

The **Court**: Well, I don't remember now that this communication—The letter transmitting the papers to be signed, was not sent to Drown. It was sent to Herbert—sent to the Bank, I mean.

Mr. **Biddison**: That is true, it was sent to the bank, if the court please, but Herbert made objection, or discussed this letter with Drown, and Drown made Herbert's protest, or statement in regard to it, to Mr. Wagg. Wagg wrote at once to Herbert and his letter is in evidence here, saying how the contract should be construed, how the escrow should be construed, and immediately after that the deed is signed, or the mortgage is signed, and the loan is completed, or shortly afterwards.

Judge **Dale**: Where is the letter from Mr. Wagg?

Mr. **Biddison**: It is here; you introduced it.

The **Court**: The letter couldn't be admitted, a letter from Drown, as to what Herbert told him; it would be purely hearsay, even if he wrote it in a letter.

A. My letter was to Mr. Herbert.

Mr. **Biddison**: Yes, his letter was to Herbert, direct.

The **Court**: That wouldn't make what Herbert told Drown competent.

516 Mr. **Biddison**:

Q. Well, after writing this letter of September 25th to W. H. Herbert, did you write him further upon the subject of that escrow?

A. I did.

Q. I will ask you if this letter dated November 12, 1898, to W. H. Herbert and wife, Cleveland, Oklahoma, which reads as follows, s your response——

Judge **Dale**: Why, that was after the mortgage was executed.

Mr. **Biddison**: We will see whether it was or not. If the court please, the acknowledgment of the mortgage is November 24th, and t was executed on November 24th, and was not sent to Mr. Wagg until December 3rd.

The **Court**: What is the date of the letter you are going to read?

Mr. **Biddison**: November 12th.

The **Court**: What year?

Mr. **Biddison**: 1898.

Judge **Dale**: The 26th of October is the day they acknowledged hat mortgage.

The **Court**: Wasn't the deed dated the same day as the mortage?

Mr. **Biddison**: There was a mistake made, and the original was ated back to cover the time the money had been in the bank. The eal was not closed until November 24th.

Here Mr. Biddison examines the papers.

The **Court**: Well, you will have to proceed, gentlemen: We an't wait any longer.

Mr. **Biddison**:

Q. I will ask you, Mr. Wagg, if at the time of writing this letter f November 12th, to which I have just called your attention, the oan had been closed.

A. It had not.

17 Q. Had you—I will read that letter. It is as follows: "W. H. Herbert and wife, Cleveland, Oklahoma——"

Judge **Dale**: We object as incompetent, because the mortgage itelf shows it was closed on the 26th day of October.

A. It was acknowledged on the 24th day of November.

Judge DALE: The mortgage says, "On this 26th day of October, personally appeared, etc.," and signed and acknowledged before W. T. Litten, Notary Public.

A. That is corrected on the records here. The correction is on file. The copy is in my copy book.

Judge DALE: Well, I don't think it is very material, anyhow.

The COURT: Well, as I remember it now, he transmitted the money to the bank, with directions to turn it over, on the signing of certain papers which he had sent. I don't see how any letter he would write would show when it was closed.

Mr. BIDDISON: The letter is here acknowledging receipt of the papers by him on December 3rd. Mr. Wagg acknowledges the return of the papers to him.

The COURT: There is no evidence as to when the bank paid them that money, so far.

Mr. BIDDISON: No evidence, further than his letter——

The COURT: Any letter that Mr. Wagg might write would not show what was done. He had no way of knowing, except through the bank.

Mr. BIDDISON: His letter is here, the letter of the date in which he instructs the bank to close that loan, or send him back the money, of a later date, I think, than November 12th. That letter is here.

518 Mr. CLARK: That mortgage was placed on file here in the Register's office on the 14th of November, and that escrow deed was acknowledged on the 24th of October.

Mr. BIDDISON: That record goes also with the affidavit of the notary at the time of filing that, that he did not—that that is an error; and they afterwards took the deed and corrected the acknowledgment.

Mr. CLARK: That affidavit of the notary which counsel refers to was not made until about two or three years afterwards, and he has not offered any testimony, either side, upon the question of that supposed correction, which is not a correct correction.

Judge DALE: Here is a letter from Mr. Wagg to the Bank of Cleveland, September 30, 1898, saying, "I enclose you nine hundred dollars," etc.

The COURT: Gentlemen, lets see if we can't make a little progress.

Mr. BIDDISON: Here is Mr. Wagg's letter of November 8th, it is already in evidence, instructing the bank to return to Mr. Wagg this money, unless the loan is closed up. Now, that is on November 8th, and on December 3rd his letter is in evidence, acknowledging receipt of the mortgage and papers from the bank.

The COURT: What date?

Mr. BIDDISON: December 3, 1898.

Judge DALE: That was after they had been recorded.

A. I ordered the money back November 8th.

Mr. Clark: The money had been paid over, and the deed on record, before those communications reached here at all.

A. No, sir.

Mr. Clark: The records so show.

519 Mr. Biddison: Wait a minute. We offer in evidence—Well it is already in evidence, so far as that is concerned, the letter of November 12th. It is as follows:

"Appleton, Wis., *Nov.* 12*th*, 1898.

W. H. Herbert, & Wife, Cleveland, Oklahoma.

Mr. Drown states you consider that to give me a deed in escrow will in default of terms of contract operate as and be a sale of said land for the loan made.

Yes, your understanding is correct. If you fail in any of the terms under which the loan is made the land is mine.

Now we both understand and agree upon it.

Waiting your action, I am,

Yours truly, S. R. WAGG."

Mr. Clark: That was about two weeks after the deal was closed up and the money paid over, but before it was sent in to Mr. Wagg. That escrow deed is the one we asked you for yesterday, claiming you never had given us permission to set our eyes on that original copy.

A. The original was put on file a year ago.

Mr. Clark: That is a copy left, and the original taken away. Mr. Wrightsman asked Mrs. Herbert yesterday about signing that escrow deed, and she said she never had seen it, and we asked for it here.

A. It was put on file.

Mr. Biddison: On the former trial of this case it was left with these papers.

Mr. Clark: It was not left here.

A. It was. I handed it to the Judge myself, or delivered it to the stenographer under the direction of the Judge.

520 Mr. Clark:

Q. Did you not testify at the former trial of this case, Mr. Wagg, that you came here direct from California?

A. Yes, sir.

Q. Did you not testify that that was the reason you did not bring that deed with you?

A. Yes, sir.

Q. And that it was home, among your papers in Wisconsin?

A. Yes, I did.

Mr. Clark: That is all.

A. And Mr. Biddison, in looking over his papers found the deed, and brought it over.

Mr. Clark:

Q. Why isn't it among these exhibits, then?
A. I don't know. I have explained it just as it was. I delivered it to the District Court stenographer, under the direction of the Judge.

Mr. Clark: I would like to offer the testimony of the stenographer that here are all the exhibits introduced.
Mr. Wrightsman: He will not testify to anything of the kind.
The Court: Gentlemen, this is not valuable for any purpose, except to furnish you a subject for controversy. Please proceed with the examination of this witness. If you have no further questions, let the witness stand aside.
Judge Dale: I move that he stand aside.
Mr. Biddison: I believe that is all.
Judge Dale: You may stand aside.
The Court: Call your next witness.

521 W. T. Fain, being produced and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Biddison:

Q. Mr. Fain, where do you reside?
A. Pawnee.
Q. What official position do you hold?
A. County Treasurer.
Q. How long have you been in that office?
A. Since October 6, 1903.
Q. Have you with you a part of the tax rolls of Pawnee County?
A. Yes, sir.
Q. Showing the payment of taxes?
A. Yes, sir.
Q. I will ask you to turn to such portion of those tax rolls as show the payment of taxes upon what is known as the Herbert homestead, if you know the numbers of it, in Jordan Valley township, in this county.
*Q*. What year do you want, Mr. Biddison?
*A*. For the year, 1898; that is, the taxes for 1898.
A. These are the rolls. I have never handled them, and I am a little unfamiliar with the forms. I will have to have a little time to refer to them.
Q. How was it assessed that year?
A. Mary B. Herbert, that year.
Q. What amount of taxes was paid on it for the year 1898, and when were they paid, and what amount of payment?
A. Well, each half is $49.72; paid November 13, 1899.
Q. Who paid them?

Mr. Biddison: I will just introduce the record, and then Your Honor can read it.

Q. I will ask you if this page 109 shows the taxes, and the payment of taxes for the year 1898, upon that land?

522 A. It does.

Mr. BIDDISON: We offer it in evidence. It reads as follows:

Thereupon Mr. Biddison read the same to the court, as follows, to wit:

523 Mr. BIDDISON: Both halves paid November 13, 1899, by S. R. Wagg.

Mr. BIDDISON:

Q. I will ask you, now, if you have the record of the taxes and the payment of the taxes upon that land for the year 1899?
A. I have.

The COURT: Wait a minute. I want to ask him a question.

The COURT:

Q. Does that record indicate whether that was due for that year or not?
A. No, sir, that record would not indicate it.
Judge DALE: I think it does. "Cost of advertising 10¢."
A. Yes, I see now.

Mr. BIDDISON:

Q. Does it show the amount of penalty, and advertising expenses?
A. Yes, it shows the amount of penalty to be $3.76, advertising ten cents. That, of course, would be in addition to the $24.94.
Q. Now, Mr. Fain, produce your tax records, showing the amount and payment of taxes upon said land for the year, 1899.
A. Amount of taxes $33.04. Penalty $1.31. Paid by S. R. Wagg. When, May 16, 1900.
Q. Have you the records here showing the assessment—showing the taxes and the payment of taxes for said land for the year, 1900?
A. I have it in my office.
Q. You haven't them here?
A. No, sir. I was only ordered to bring up these two books.

Mr. BIDDISON: Will you agree this is the correct amount, Judge, as stated in our pleadings?
Judge DALE: I don't know what you have there.
Mr. BIDDISON: Taxes $26.34, and $1.36 penalty.

524 Judge DALE: Yes, I guess that is right. When were they paid?

Mr. BIDDISON: I haven't got the date of the payment. They were paid by Mr. Wagg.
Judge DALE: That must have been paid, then, some time along in the latter part of May, 1901, under the penalty, after you got the second deed, I presume. It must have been.
Mr. BIDDISON: This will state whether it was or not. (Referring to the petition.) It was as early as the spring of 1901.

Judge DALE: Well, I think it was after you got that deed.

Mr. BIDDISON: No, I think it was before. You can get that, can't you, Mr. Fain?

The COURT: It would have been a lien, anyway, at the time the deed was made.

Judge DALE: Yes, I guess so.

Mr. BIDDISON: If the court please, the much controverted escrow deed is here, and has been attached to this bunch of papers all the time.

Mr. WRIGHTSMAN: Concerning which the defendant was impeached by counsel.

Mr. BIDDISON: We offer it in evidence.

Judge DALE: I thought it was in evidence. I thought all that stuff was in evidence.

Mr. BIDDISON: It was the last time; but I supposed it was lost until Mr. Wrightsman dug it up here.

Mr. CLARK: A copy of it is attached to the petition, and admitted by the answer.

Mr. BIDDISON: Yes. The deed was dated November 24th, and acknowledged at that time.

525 The COURT: There is a part of this torn off.

Mr. BIDDISON: That part torn off, I think is correctly transcribed in the exhibit attached to the petition.

The COURT: Well, what next, gentlemen?

Mr. BIDDISON: I just want to finish with Mr. Fain, with that other record, and we are ready to rest the case then; except as to these other lot owners, on their issues. We will rest the main issue, as soon as we can introduce that evidence.

The COURT: Have you anything in rebuttal, gentlemen?

Judge DALE: Yes, sir.

—— NASH, being recalled as a witness on behalf of the plaintiff, in rebuttal, testifies as follows:

Direct examination by Judge DALE:

Q. Mr. Nash, did you have any conversation with Mr. Wagg, and either of the Mr. Drowns, with reference to the purchase of this hay?

A. Yes, sir.

Mr. WRIGHTSMAN: Objected to, for the reason that the witness testified to these matters before.

The COURT: Well, that was the controversy that arose, and that is the reason the court will let them put him back.

A. I testified this morning that I did.

Judge DALE:

Q. How long was it after you made the offer to Mrs. Herbert, until you saw these parties, and made the offer to them?

A. I couldn't tell you; I don't think it was very many days.

526 Q. Just very briefly state to the court what occurred when you made that offer. Tell the court what you said, and what they said, and do it as briefly as possible.

A. Well, I asked Mr. Wagg about the hay, and he said they *they* were going to cut the hay, or Mr. Drown was, and whatever arrangement I made with Mr. Drown would be all right. And I walked along with Mr. Drown, I believe out to where he was milking, and talked to him about the hay, and he said that they were going to cut and bale the hay. I asked him if he would sell it, and I believe that he said he would. And I asked him what it was worth, and he said it was worth a dollar and a half a ton, that is what he told me, for the hay. That was the old gentleman Drown.

Q. Now what offer did you make, if any, to him?

A. I didn't make any offer——

Mr. Wrightsman: Wait a minute. No foundation for that has ever been laid, as to any conversation between this man and Mr. Drown, Sr.

Judge Dale: Mr. Wagg sent him to Mr. Drown, Sr. What is the matter with you?

A. Yes, sir, Mr. Wagg told me whatever arrangements I made with Mr. Drown, and Mr. Drown introduced me to Mr. Wagg——

The Court: Go ahead and state what you offered him, if anything.

A. That is all the conversation. I walked off.

Judge Dale:

Q. You had previously made an offer of a dollar an acre to Mrs. Herbert?

A. Yes, sir.

Q. Did you tell them what you had offered Mrs. Herbert, or either of them?

527 Mr. Biddison: We object to that. He has stated all the conversation.

The Court: Objection overruled.

Mr. Biddison: Exception.

A. I don't remember that I did.

Judge Dale:

Q. Were you ready and willing to pay a dollar an acre for that hay?

A. Yes, sir.

Q. You say you were?

A. Yes, sir.

Judge Dale: That is all.

Mr. Biddison: That is all.

The Court: Anything further, gentlemen, on rebuttal?

Judge Dale: Just wait a moment, Your Honor.

The Court: That is what I am doing, most of the time.

Judge Dale: We rest.

Mr. Biddison: The treasurer has not come up with that record, yet.

Judge Dale: You may offer that afterwards.

Mr. Biddison: Well, that is satisfactory.

The Court: You agreed on it, anyway, except as to the time
payment. It was a proper charge, whether it was paid before
afterwards.

Mr. Biddison: Very well, that may be considered. We rest.

And no other or further or different evidence was received in sa
cause.

528 I, R. H. Hudson, Official Stenographer of the District Cou
of the Fourth Judicial District of the Territory of Oklahom
do hereby certify that, as such stenographer, I took down in sho
hand a full, true and complete report of the proceedings had upo
the trial of the case of Mary B. Herbert, *et al. v.* S. R. Wagg, *et a*
at the April, 1905, term of the District Court of Pawnee Count
Oklahoma Territory, and that the above and foregoing is a full, tru
and correct transcript of my shorthand report so taken.

R. H. HUDSON,
*Official Stenographer, District Court,*
*Fourth Judicial District of Oklahoma.*

Filed May 8, 1906.
BENJ. F. HEGLER,
*Clerk Supreme Court.*

528½ The foregoing is all the evidence introduced upon t
trial of said cause and all the evidence upon which Jud
ment was rendered therein.

Thereupon said cause was argued to the Court by Counsel f
Plaintiff and Defendant, after which argument the court render
judgment in favor of the Plaintiff and against the Defendant a
which judgment was in words and figures as appears in the Journ
Entry thereof and of the proceedings upon said cause, and whic
journal Entry is in words and figures as follows, to wit:

529 In the District Court in and for Pawnee County, Oklahom
Territory.

Case No. 1101.

W. H. Herbert et al., Plaintiff-,
*vs.*
S. R. Wagg et al., Defendant-.

*Journal Entry on Decree.*

Now, to wit, on this the 18th day of May, A. D., 1905, the sam
being a regular judicial day of the District Court of Pawnee *Cour*
Oklahoma Territory, the above styled cause came on to trial, pu
suant to the assignment heretofore made; the Plaintiff Mary I
Herbert, being present in person, and by her attorneys, McGuire

Clark and Dale & Bierer, the Plaintiff W. H. Herbert not appearing, the defendant S. R. Wagg being present in person and by his Attorneys Biddison & Eagleton, and each and all the other Defendants being present in person and by attorneys, and Counsel announcing in open court ready for trial upon the issue joined by the pleadings as between the Plaintiffs and Defendant S. R. Wagg and a jury being waived in said cause, the Court proceeded to try the issue as joined in the pleadings between the said parties Herbert and Wagg, and thereupon evidence was introduced upon the issue*d* being tried and the hour of adjournment having arrived the said cause was continued to the following day May the 19th, at which time said cause was resumed and further evidence offered and at the conclusion of the evidence and after the argument in the cause the court finds the issues in favor of the Plaintiff and against the Defendant S. R. Wagg, and further finds from the pleadings and evidence in said cause, that the Plaintiffs instituted the action to have a deed executed by the Plaintiff Mary B. Herbert, upon the following described property, to wit: The north Fifty-five acres of the West one-half of the southeast quarter of Section Eight, Township
Twenty-one North of Range Eight, commonly known as the
530 Wagg Addition to the Town of Cleveland, Pawnee County,
Oklahoma Territory declared a mortgage only upon said land, said deed having been executed on May the 28th, 1901. And then an accounting is asked for in said cause as between the Plaintiff and S. R. Wagg, and the Court further finds that since the execution of said deed as aforesaid by the Plaintiff Mary B. Herbert, and the recording thereof in the office of the Register of Deeds of Pawnee County Oklahoma Territory, the Defendant S. R. Wagg has platted the land described in said deed into lots, blocks, streets and alleys, as an addition to the Town of Cleveland, Pawnee County, Oklahoma Territory, and that the other named Defendants have purchased from said S. R. Wagg, and claim to have so purchased lots in said addition, and without notice of any claim of right or interest of the said Plaintiff in or to said property, and that said purchasers were prior to the time when the plaintiff instituted her suit in said cause: and no testimony has been offered in the hearing of the case as between the plaintiffs and S. R. Wagg upon the question of good faith of such purchasers, and the Court is not at this time advised sufficiently to determine the rights of said Defendants other than S. R. Wagg by reason of their purchase of lots in said above named addition and the property involved in this action.

And the court further finds that an accounting between the Plaintiff and Defendant S. R. Wagg should be had, and that said S. R. Wagg, should pay to the Plaintiff all sums of money received by him for those acting for and on behalf of said Defendant S. R. Wagg, for lots sold and transferred to innocent purchasers for value prior to the time Plaintiffs instituted their action; and that in said accounting said Defendant S. R. Wagg should be allowed as an offset against any sum found due the Plaintiff and recover the princip*le* sum named in his mortgage and interest thereon as stipulated in

said mortgage, and also should be reimbursed for moneys
531 pa*y*ed for taxes or assessments with interest thereon as pro-
vided by law, and that said S. R. Wagg should be allowed such further sum to reimburse him for the reasonable expense of platting and sub-dividing or necessary expense in selling said land involved in this controversy, and that a Referee should be appointed for the purpose of taking testimony and making findings of facts and conclusions of law as relating to the questions of the *bona fides* of the purchasers of lots and the issues joined therein between said parties and the amount received by the said S. R. Wagg for the sale of lots and the expenses incurred as above stated by said S. R. Wagg, and the amount due S. R. Wagg as above indicated under the mortgage and for taxes paid by him upon said land.

It is therefore by the Court considered, ordered, adjudged and decreed that the deed executed by Mary B. Herbert on the 28th day of May, 1901, be and the same is hereby, declared a mortgage upon all the above described real estate, to wit, the North fifty-five acres of the West half of the South East Quarter of Section Eight (8) Township Twenty-one (21) North of Range Eight (8) East in Pawnee County, Oklahoma, said land being commonly known as Wagg Addition to the Town of Cleveland, in Pawnee County, Ok. and that said Deed be and it is hereby declared to be a mortgage lien upon said property, for the principal sum of $1,000.00 with interest as stipulated in the certain mortgage bearing date of October 24, 1898, executed by Mary B. Herbert and W. H. Herbert and subject also to the further provisions of said mortgage, copy of which is attached to Plaintiff's Petition.

And that Plaintiff be reinvested with the title to said property subject to said mortgage and lien for taxes and the expenses properly incurred as hereinabove set forth and further subject to the plat of said land on file; that an accounting be had between said
Plaintiff Mary B. Herbert and Defendant S. R. Wagg for
532 the purpose of determining the amount of moneys receives by
the said S. R. Wagg for the lots sold by him and moneys received from said property, and in case it is found that said Defendant S. R. Wagg has received from the sale of said propert*y*-s and products of said land a sum in excess of that which is due him under the findings of this court, that judgment be rendered in favor of this Plaintiff and against said S. R. Wagg.

That Victor O. Johnson having been agreed upon by the Counsel in said cause as a proper person, be and he is hereby, appointed a Referee, with directions to proceed at once to take testimony either at Pawnee or at Cleveland in Pawnee County, Oklahoma Territory, for the purpose of determining the questions arising out of the accounting between the Plaintiff and Defendant S. R. Wagg, and that he is hereby directed to hear evidence and make findings of fact and conclusions of law and present the same to the court at a time to be hereinafter fixed upon the question of the other Defendants rights, claiming an interest in said lots in said Wagg Addition, and issues joined or to be joined in the pleadings, upon said question, and in said report to find what lots were sold to *bona fide* purhasers prior to the date at which the suit was instituted, and also o find what lots were not so sold, and that all parties who had not een made Defendants in this action, and are claiming any interest n the property or lots in the Wagg Addition shall have the right o intervene and have their rights determined in this action and he Referee is hereby directed to take testimony relating thereto.

It is further ordered, adjudged and decreed that the Defendant S. R. Wagg be charged with all the costs in this action, to which findngs, judgments and decree the Defendants, S. R. Wagg at the ime excepted, and thereafter filed a motion for a new trial, which said motion will be passed upon by the court when the said
33 cause shall be finally hear- upon the report of the Referee.

JNO. H. BURFORD, *Judge.*

O. K.
DALE.

Filed May 8, 1906.
BENJ. F. HEGLER,
*Clerk Supreme Court.*

34 And thereupon and upon the same day, the defendant S. R. Wagg, filed his motion for a new trial, which Motion in words and figures as follows, to wit:

n the District Court in and for Pawnee County, Oklahoma Territory.

W. H. HERBERT ET AL., Plaintiff-,
*vs.*
S. R. WAGG ET AL., Defendant-.

*Motion for New Trial.*

Comes now the Defendant S. R. Wagg and moves the Court to set ide the judgment rendered in this cause on this day and grant him new trial herein for the following reasons to wit:

1. Because said judgment is not sustained by sufficient evidence.
2. Because said judgment is contrary to law.
3. Because of errors of law occur-ing at the trial and excepted to by e Defendant S. R. Wagg at the time.
4. Because the Court admitted testimony over the objections of the efendant S. R. Wagg to which he at the time duly excepted.
5. Because the court refused to admit testimony offered by the efendant S. R. Wagg, which refusal was at the time duly excepted by the Defendant S. R. Wagg.

BIDDISON & EAGLETON,
*Att'ys for Defendant S. R. Wagg.*

Endorsed on back as follows, W. H. Herbert *et al.*, Plaintiffs, *v.* R. Wagg *et al.*, Defendants. Motion for a new trial. Filed in e District Court May 19, 1905, Jay E. Pickard, Clerk by C. W. acon, Deputy.

535 And thereupon said cause is by the court upon said motion for a new trial continued until the 29th day of June, 1905. And thereupon and upon the 29th day of June 1905, said cause came on regularly for hearing upon the said motion for a new trial, and said motion was by the Court overruled, to which ruling of the court the Defendant S. R. Wagg at the time excepted and excepts, and such proceedings were had upon said motion for a new trial and thereafter as appears by the Journal Entry of said proceedings, which is in words and figures as follows, to wit:

536 In the District Court in and for Pawnee County, Oklahoma Territory.

MARY B. HERBERT ET AL.
*v.*
S. R. WAGG ET AL.

*Journal Entry.*

Now, to wit, on this the 29th day of June, 1905, the same being a regular judicial day of the regular 1905 term of the District Court in and for Pawnee County, Oklahoma Territory, the above cause came on for hearing upon the Motion of the Defendant S. R. Wagg for a new trial therein. The Plaintiff Mary B. Herbert present in person and Counsel for Plaintiff also present, Defendant, S. R. Wagg present by his attorney- Biddison & Eagleton, and said motion being duly argued *argued* and considered it is by the court considered, ordered and adjudged, that said motion for a new trial be and the same is overruled, to which ruling the defendant S. R. Wagg excepted, thereupon Counsel for said Defendant prayed an appeal and for an extension of time in which to make and serve a case made for the Supreme Court, which application was granted, and defendant Wagg is allowed ninety days' time in which to make and serve a case made; that Plaintiff have ten days from date of service in which to suggest amendments thereto, said case made to be settled upon notice in writing of five days of the time and place of presenting said case made for settlement.

Thereupon application of the said Defendant, the enforcement of the judgment is stayed pending the filing in the Supreme Court of said Defendant's Petition in Error, provided said Petition in Error shall be so filed on or Before October 15th, 1905, and of a bond to be approved by the Clerk of this Court in the sum of Five Thousand Dollars.

JNO. H. BURFORD, *Judge.*

O. K.
CLARK & McGUIRE AND
DALE & BIERER,
*Att'ys for Pl'ff.*
BIDDISON & EAGLETON,
*Att'ys for Def'ts.*

Endorsed on back as follows: 1101. Mary B. Herbert, *et al., v.* S. R. Wagg, *et al.* Journal Entry. Filed June 29th, 1905, Jay E. Pickard, Clerk, by C. W. Bacon, Deputy. Filed May 8, 537 1906, Benj. F. Hegler, Clerk Supreme Court.

538 TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

We hereby acknowledge and accept service of the foregoing case-made to have been made on us this 26th day of September, A. D. 1905.

McGUIRE & CLARK,
*Att'ys for Plaintiff.*
W. L. EAGLETON AND
WRIGHTSMAN & FULTON,
*Att'ys for Defendants, Other Than S. R. Wagg.*

Filed May 8, 1906.
BENJ. F. HEGLER,
*Clerk Supreme Court.*

We hereby waive service of notice of time and place of settlement of foregoing case made and not having any amendments to suggest we consent that same may be signed and settled at any time or place.

E. M. CLARK,
*Attorneys for Plaintiff.*

Filed May 8, 1906.
BENJ. F. HEGLER,
*Clerk Supreme Court.*

539 TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

This is to certify that I do hereby certify that the foregoing case made has been duly served in due time and the same duly submitted to me for settlement and signing as required by law by the parties to said cause each being present by attorney. That no amendments have been suggested to the case made and that the same as above set forth is true and correct and contains a full and true statement of all the pleadings, Motions, Orders, Evidence, Verdict, Findings, Proceedings, Judgment and the Record in said case.

I hereby settle, allow, certify and sign the same as true and correct and as a correct case made, and I hereby order that the Clerk of the District Court attest the same with the seal of said court and file the same of record.

Witness my hand at Pawnee, in the County of Pawnee, Oklahoma Territory this the 17th day of November, A. D. 1905.

JNO. H. BURFORD, *Judge.*

Attest:
[SEAL.] JAY E. PICKARD, *Clerk,*
By C. W. BACON, *Deputy.*

Filed May 8, 1906.
BENJ. F. HEGLER,
*Clerk Supreme Court.*

Further endorsed: Filed in the District Court Nov. 17, 1905, J. E. Pickard, Clerk by C. W. Bacon, Deputy.

540 Case Made endorsed as follows: No. 1946. S. R. Wagg, *v.* Mary Herbert, *et al.* Petition in error and Case Made. Filed May 8, 1906, Benj. F. Hegler, Clerk Supreme Court.

541 In the Supreme Court of the Territory of Oklahoma.

S. R. WAGG, Plaintiff in Error,

*vs.*

MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROOKSTOOL, WILLIAM A. ROOKSTOOL, EDNA D. ROOKSTOOL, GERTRUDE M. MARTIN, THE CHRISTIAN CHURCH, EFFIE S. GRIFFIN, DICKERSON, GOODMAN, SMILEY LUMBER COMPANY, DAVID B. HOLLER, SAMUEL R. HULL, M. E. HULL, E. R. LANE, THOMAS H. WILLIAMS, THOMAS B. ANDREAN, JOHN B. MEYERS, C. I. GREEN, H. C. BERWICK, FIRST NATIONAL BANK OF CLEVELAND (a Corporation), EVIE P. GILBERT, JAMES W. EAGLIN, V. MAY EAGLIN, GEORGE LEE, WILLIAM R. HOWELL, R. L. BURT, CHAS. E. FUNK, JOE S. ROGERS, S. R. KEELING, ANNIE BERWICK, KATE WYRICK, THE TRIANGLE BANK (a Corporation), DOAR A. DUNCAN, GEORGE FARABEE, JOHN SEGAN, WILLIAM SMITHSON, JOSEPH ALDERSON, J. J. ALDERSON, THOMAS CLAWSON, J. S. SEWELL, S. R. DONGES, FRANK PORTER, NOAH A. MILLER, A. R. ANDREAN, and IRENE LANNING, Defendants in Error.

*Appearance By Defendant Mary B. Herbert.*

Comes now the above named defendant in error, Mary B. Herbert, by E. M. Clark, her attorneys and waives the issuance and service of summons in error in this cause and hereby enters her appearance therein.

E. M. CLARK,
*Att'ys for Mary B. Herbert.*

Endorsed: 1946—S. R. Wagg *vs.* Mary B. Herbert *et al.*—Waiver issue and service summons in error, and entry appearance of Mary B. Herbert—Filed May 8, 1906—Benj. F. Hegler, Clerk Supreme Court.

542 In the Supreme Court of the Territory of Oklahoma.

S. R. WAGG, Plaintiff in Error,

*vs.*

MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROOKSTOOL, WILLIAM A. ROOKSTOOL, EDNA D. ROOKSTOOL, GERTRUDE M. MARTIN, THE CHRISTIAN CHURCH, EFFIE S. GRIFFIN, DICKERSON, GOODMAN, SMILEY LUMBER COMPANY, DAVID B. HOLLER, SAMUEL R. HULL, M. E. HULL, E. R. LANE, THOMAS H. WILLIAMS, THOMAS B. ANDREAN, JOHN B. MEYERS, C. I. GREEN, H. C. BERWICK, FIRST NATIONAL BANK OF CLEVELAND (a Corporation), EVIE P. GILBERT, JAMES W. EAGLIN, V. MAY EAGLIN, GEORGE LEE, WILLIAM R. HOWELL, R. L. BURT, CHAS. E. FUNK, JOE S. ROGERS, S. R. KEELING, ANNIE BERWICK, KATE WYRICK, THE TRIANGLE BANK (a Corporation), DOAR A. DUNCAN, GEORGE FARABEE, JOHN SEGAN, WILLIAM SMITHSON, JOSEPH ALDERSON, J. J. ALDERSON, THOMAS CLAWSON, J. S. SEWELL, S. R. DONGES, FRANK PORTER, NOAH A. MILLER, A. R. ANDREAN, and IRENE LANNING, Defendants in Error.

*Appearance and Cross Petition by Defendants in Error.*

Comes now the following named defendants in error, to wit: Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gertrude M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a Corporation), Evie P. Gilbert, James W. Eaglin, V. May Eaglin, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a Corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, Frank Porter, Noah A. Miller, A. R. Andrean and Irene Lanning by Wrightsman & Diggs and Biddison & Eagleton their attorneys and waive the issuance and service of summons in the above entitled action and enter their appearance therein, and join in the prayer of the plaintiff in error in his petition in error contained and pray that said cause be reversed and remanded, 543 confessing all the errors in said petition set out.

BIDDISON & EAGLETON,
WRIGHTSMAN & DIGGS,
*Attorneys for Said Defendants.*

Endorsed: 1946—S. R. Wagg *vs.* Mary B. Herbert *et al.*—Appearance and cross petition of deft. in error Le Roy M. Drown *et al.*—Filed May 8, 1906, Benj. F. Hegler, Clerk Supreme Court.

544 And thereafter, at the January, 1907, Term of said Supreme Court, on the Third day of January, 1907, the following proceeding was had in said cause, to wit:

# 1946.

S. R. WAGG, Plaintiff in Error,
*vs.*
MARY B. HERBERT ET AL., Defendants in Error.

Come now A. J. Biddison for plaintiff in error, and E. M. Clark for defendants in error, and make oral argument herein. And cause is taken on record, briefs and oral argument submitted herein.

545 And thereafter, at the June, 1907, Term of said Supreme Court, on the Twelfth day of October, 1907, the following proceeding was had in said cause, to wit:

# 1946.

S. R. WAGG, Plaintiff in Error,
*vs.*
MARY B. HERBERT ET AL., Defendants in Error.

And now this cause come on for final decision and determination by the Court, upon the record and briefs submitted herein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion of the court by Hainer, J. All the Justices concurring except Burford, C. J., who tried the cause below, not sitting, and Pancoast and Garber, J. J., absent.

Which opinion reads in words and figures as follows, to wit:

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## No. 1946.

In the Supreme Court of the Territory of Oklahoma. June Term, 1907.

Filed October 12, 1907.

S. R. WAGG, Plaintiff in Error,

*vs.*

MARY B. HERBERT ET AL., Defendants in Error.

*Syllabus.*

1. When the question before a court of equity is whether a deed which purports upon its face to be an absolute deed was in reality a deed or a mortgage, extraneous evidence is admissable to show that it was only a mortgage.
2. Where a transaction was in substance and effect a loan of money upon the security of a farm, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.
3. A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest and without fraud, and where no undue influence or unconscionable advantage has been taken of his position by the mortgagee; but to insist on what was really a mortgage as a sale, is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.
4. Where a mortgagee purchases the premises of the mortgagor, and the evidence discloses that fraud was committed and undue influence was used, and where the transaction shows that it was unfair and an unconscionable advantage had been taken by virtue of the position of the mortgagee, a court of equity will decree a deed, which is absolute on its face, to be a mortgage.
5. A sale of property to a mortgagee is to be scrutinized to see whether any undue advantage has been taken of the mortgagor, and especially is this necessary when the mortgagee in the inception and throughout the whole conduct of the business has shown himself ready and skillful to take advantage of the necessities of the borrower.
6. In determining the question whether the transaction was a sale or a mortgage, it is of great importance to inquire whether the consideration was adequate to induce a sale.
7. Under the circumstances of this case, the plaintiff was not guilty of such laches or acquiescence as would preclude her from asserting her equitable rights under the well settled principles of equity jurisprudence.

Error from the District Court of Pawnee County.
Jno. H. Burford, Trial Judge.
Affirmed.

Biddison & Eagleton, for Plaintiff in error.

E. M. Clark, and Wrightsman & Diggs, for Defendants in error.

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## Statement of Case.

This was a suit in equity commenced in the district court of Pawnee county, Oklahoma, on June 13, 1903, by W. H. Herbert and Mary B. Herbert against S. R. Wagg and 47 other defendants, the object and prayer of which was to cancel a deed, absolute on its face, executed by Mary B. Herbert to S. R. Wagg on May 28, 1901, and for other equitable relief, on the ground that it was obtained through fraud, oppression and undue influence, as alleged in the plaintiffs' amended petition. In order that the issues may be clearly and fully understood in this case, we think it proper to set out the facts fully as pleaded in the amended petition and in the answer thereto by the defendant Wagg. The second amended petition, upon which this case was tried, is as follows:

"Comes now the above named plaintiff and having first obtained leave of the court, files this her second amended petition; and for her cause of action against the defendants herein alleges:

That the above named plaintiff is and at all times mentioned herein was the owner of and residing upon the west one-half of the south east quarter of section eight, township twenty-one north of range eight east of the I. M. in Pawnee county, Oklahoma Territory; and has so resided with her husband until his decease,
547 and with her two minor children at all times since the title
thereto was acquired under the homestead laws of the United States as a home, and claiming the same as a home under and by virtue of the laws of the United States and of the homestead laws of the Territory of Oklahoma.

That upon the 26th day of October, 1898, the above named plaintiff with her husband, W. H. Herbert, who is now deceased, borrowed from the above named defendant S. R. Wagg, $900.00 and executed therefor a certain promissory note in the sum of $1000.00, a copy of which is hereto attached marked Exhibit "A" and made a part hereof. And to secure the payment of said note to the said S. R. Wagg, executed their certain mortgage upon the real estate above described, a copy of which is attached hereto marked Exhibit "B" and made a part hereof. And as further security for the payment of said indebtedness signed their certain instrument in the form of a warranty deed, a copy of which is hereto attached marked Exhibit "C" and made a part hereof, and placed said Exhibit "C" in the Bank of Cleveland, to be by it held in accordance with the terms expressed in a certain writing, delivered by said defendant S. R. Wagg to this plaintiff and her said husband, as an inducement for the signing of said Exhibit "C" and containing the terms and conditions under which the said Exhibit "C" was signed and the conditions under which it should be delivered to the said defendant S. R. Wagg, a copy of which is hereto attached marked Exhibit "D" and made a part hereof.

That in the taking possession of said Exhibit "D" and the said real estate, and in the negotiations looking to the redemption of said real estate from the said mortgage as embraced in all of said Exhibit "A," "B," "C," and "D" all as herein alleged; the said Leroy M. Drown acted with, for and in behalf of the said defendant S. R.

Wagg as his agent with full authority as such agent, and did in his capacity as such agent help, aid and abet the said S. R. Wagg in the doing of the various things herein alleged to have been wrongfully done by the said S. R. Wagg.

This plaintiff further alleges that on or about the 26th day of December 1899, without the knowledge or consent of either this plaintiff or her said husband, and in violation of the conditions expressed in said Exhibit "D," and to defraud and wrong this plaintiff and her said husband, and in violation of their rights in the premises, and in violation of the duties of said S. R. Wagg in the premises under the relationship existing between this said plaintiff and her husband and the said S. R. Wagg, the said S. R. Wagg did obtain possession of the said Exhibit "C" and on December 26th, 1899, did cause the same to be placed of record in the office of the Register of Deeds in and for Pawnee county, Oklahoma Territory, and recorded in book one of deeds at page 329; and thereby in particular did violate the conditions expressed in Exhibit "D" in this to wit: That the said deed was not under any circumstances to be delivered to the said S. R. Wagg until two years and a half after the date thereof, Which time had not expired at the time of the taking of the same by the said S. R. Wagg. And thereby in particular did violate the rights of this plaintiff in this: That the said deed and said Exhibit "D" were but parts of the mortgage transaction and conveyed no title. And that the said S. R. Wagg obtained possession of the same for the unlawful purpose of, and did use the same for the unlawful purpose of setting up and claiming title thereunder adverse to this said plaintiff and her said husband, and did take possession by force and fraud of said real estate as herein alleged, and did thereby oppress this plaintiff and by said means fraudulently, wrongfully, and by the use of said undue advantage, and the taking advantage of the conditions of this plaintiff, and of the position which he occupied by reason of the relations existing as hereinbefore alleged at a time when this plaintiff was financially embarrassed by reason of the facts herein alleged; and by reason of the financial embarrassment of this plaintiff, and in pursuance of the advantage of said S. R. Wagg and the disadvantage of this plaintiff said S. R. Wagg did in the month of February, 1900, notify this plaintiff and her
548 said husband that the said deed was recorded, and that this plaintiff and her said husband no longer owned said land, and that at all times thereafter did persistently, wrongfully and continually claim to this plaintiff and her said husband, and to the public, that he the said S. R. Wagg was the absolute owner of said real estate without the right of redemption being in this plaintiff and her said husband. And in furtherance thereof, the said S. R. Wagg did on or about the 14th day of May, 1900, come to the said premises and take possession by force and over the objection and protest of this plaintiff, and in the absence of her said husband of the major portion of said premises, and thereby deprived this said plaintiff and her family of the enjoyment thereof, the means of livelihood and of complying with the contracts referred to as exhibits herein; which could and would have been done with the rents and profits thereof.

And upon this plaintiff soliciting permission to redeem from said mortgage, the said S. R. Wagg refused to accept from this plaintiff the amount due upon the said note and mortgage and attempted, to exact from this plaintiff the sum of $400.00 in excess of what was due on said mortgage according to the terms thereof, and before the time when said S. R. Wagg would have been authorized to take possession of said Exhibit "E" and in furtherance of his said design to wrong and defraud the said S. R. Wagg refused to accept even the said excess of $400.00, under the fraudulent, wrongful and oppressive and unjust claim of him the said S. R. Wagg being the absolute owner thereof, and by reason of the said fraud, oppression and over persuasion, undue influence and taking advantage of his position and the relationship of parties as herein set forth, and the disadvantage under which this plaintiff was placed by reason of the acts herein complained of, the said S. R. Wagg, for a grossly inadequate consideration procure from this plaintiff who was at the time inexperienced in transacting business, and during the absence of her said husband, a purported warranty deed to all of said real estate, a copy of which deed is hereto attached, marked Exhibit "E" and made a part hereof. As a consideration therefore the said S. R. Wagg did give a deed to this plaintiff to twenty-five acres of said real estate, which was at the time this plaintiff's own property, a copy of which deed is hereto attached, marked Exhibit "F" and made a part hereof.

That that only consideration received by this plaintiff for the said purported deed marked Exhibit "E" was a relinquishment of the said mortgage herein referred to as Exhibit "B" and ever since which time the said defendant S. R. Wagg and his assigns has retained and held the possession to the north 55 acres of said real estate, which is not included in Exhibit "F," the same being, substantially the same portion of said real estate which said S. R. Wagg by force and violence took and at all time thereafter has held from the possession of this plaintiff as hereinbefore alleged, on or about the 14th day of May, 1900, and since which time the said S. R. Wagg has had, received and retained the rents and profits thereof. And for the purpose of further clouding said transaction had said Exhibit "C" again recorded on May 6th, 1901, in book one page 581, in the office of the Register of Deeds of said county.

That the said real estate was at the time of the giving of said Exhibit "E" of the fair and reasonable value of $100.00 per acre. And that had it not been for the misconduct, wrongs, oppression, fraud, deceit, undue influence, over persuasion and the advantage of the position occupied by reason of the relationship of parties as herein set forth, and by reason of the financial depressed condition of this plaintiff by reason thereof, the said deed referred to herein as Exhibit "E" would never have been executed.

This plaintiff further alleges that the defendants herein, are by reason of the wrongs herein set forth now in the actual possession of all of said eighty acres of land excepting the twenty-five acres referred to in said Exhibit "F." This plaintiff further — that she has an equitable estate in all of said eighty acres, and is in equity

the owner thereof, subject to the rights of said S. R. Wagg as
549 mortgagee, and is entitled to the immediate possession thereof,
and that the defendants unlawfully keep this plaintiff out
of the possession of the north fifty-five acres thereof, not included in
said Exhibit "F."

That this plaintiff hereby tenders and brings into court for the use and benefit of said defendants herein the full consideration represented by the said note and mortgage together with the interest and taxes according to the terms thereof, and stands ready and willing to pay the same on the order of the court.

Plaintiff further alleges that on the 14th day of May, 1900, the defendant S. R. Wagg took possession of all of said eighty acres of land excepting the house occupied by plaintiff and a small piece of ground upon which said house was located and the curtileges thereof, and that the defendant was held, kept and caused to be kept from this plaintiff, the possession of said tract of land from that time until the present and that the value of the use and occupation of said land so held by the said defendant and retained from plaintiff has been and is the sum of $800.00.

Plaintiff further alleges that subsequent to the delivery by the plaintiff to the defendant S. R. Wagg of the deed of which Exhibit "E" is a copy, the defendant S. R. Wagg made and executed a plat of the fifty-five acres of land not embrassed in said Exhibit "F," platting the same into lots, blocks, streets, and alleys for townsite purposes, and named the said plat Wagg's addition to the Town of Cleveland, Pawnee county, Oklahoma Territory, and did subsequently and before this action was brought, proceed to sell some of said lots, to innocent purchasers, the exact lots and amounts received for which are not known to the plaintiff, but which amounts to a large sum of money. And plaintiff alleges that the defendant S. R. Wagg has not accounted to the plaintiff for said moneys, but has converted the same to his own use; and that an accounting is necessary between the said plaintiff and defendant to determine the amount which the said defendant has so unlawfully received and converted to his own use.

That the defendants herein other than the said S. R. Wagg claim to have some interest in the real estate involved herein adverse to this plaintiff, the exact nature of which is unknown to this plaintiff, but that the same is subordinate and inferior to the rights of this plaintiff herein.

Wherefore, Plaintiff prays judgment that the said deed referred to as Exhibit "E" be cancelled and held for naught; and that it be adjudged and decreed by this court, that the deed referred to as Exhibit "C" be held to be a part and parcel of the said mortgage Exhibit "B." And that the court determine the amount due as principal and interest on said mortgage from the plaintiff to the defendant. And that the court proceed to determine the amount in crops, produce, rents, use and occupation which the said S. R. Wagg defendant herein has taken or caused to be taken from this plaintiff and from said eighty acres of land or any part thereof; and that the same be charged to said S. R. Wagg and credited to this plaintiff.

And that the court after the trial of the issues between this plai
tiff and the other defendants herein also take an accounting and
termine the amount of money which the said S. R. Wagg has
ceived or should have received in money, notes and property for t
sale or trade of lots to innocent purchasers without notice of t
rights of this plaintiff after the same shall have been determined
this court under the issues formed or to be formed between plaint
and defendants herein, upon the portion platted by him of the sa
eighty acres, that is to say of the fifty-five acres of land; and th
the same be charged to the said S. R. Wagg defendant herein, a
after the defendant S. R. Wagg is given credit for the balance d
on said note and mortgage and taxes, that this plaintiff be giv
judgment against the said S. R. Wagg for the balance due th
plaintiff on said account.

550 And this plaintiff further prays judgment that she
restored to the possession of all the remainder of said lan
and that the defendant S. R. Wagg and all persons holding b
through or under him and against all the defendants herein a
their alleged transferrees, excepting such as shall by this court
decreed to be innocent purchasers thereof in good faith and for
good and sufficient consideration. And that all other claims or p
tended claims by any of the defendants herein be barred and he
for naught; and that this plaintiff be granted such other and furth
relief as the court may deem legal and just; and that this plaint
recover her costs in this action."

Exhibit "A," which is made a part of the amended petition,
as follows:

"$1000.00. CLEVELAND, O. T., *Oct.* 24, 1898.

Five years without grace, after date, for value received, we
principals promise to pay to the order of S. R. Wagg, one Thousa
and No–100 Dollars, at the Bank of Cleveland, and interest there
at the rate of ten per cent. per annum from October 21, 1899, pa
able annually in advance and if not paid when due to bear ten p
cent. interest from date. The makers and endorsers severally wai
presentment of this note for payment, and protest, and notice
non-payment, and agree that the time for payment of this note m
be extended from time to time without notice and that no such
tension shall impair or change the liability of any of these part
hereto. If suit be instituted we agree that judgment be render
for ten per cent., additional as attorneys fees.

(Signed) MARY B. HERBERT.
W. H. HERBERT."

Exhibit "B" reads as follows:

"No. 1793.

Mortgage from W. H. Herbert and Mary B. Herbert to S. R. Wag

Know all Men, that on this 24th day of October 1898, Mary
Herbert and W. H. Herbert, husband and wife both of Cleveland,
T. parties of the first part, in consideration of ($1000.00) O

Thousand Dollars, in hand paid by S. R. Wagg party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to said party of the second part, his heirs and assigns forever, the following real estate lying and being in the county of Pawnee, and Territory of Oklahoma and known and described as follows to wit: The same being the west half of the southeast quarter (S. E. ¼) of Section eight (8) in township twenty-one (21) north of range eight (8) East of the Indian Meridian, the same being eighty acres of land adjacent to and adjoining the town of Cleveland, O. T. For further description the farm is bounded on the north by Joe Box's farm, on the east by the town of Cleveland, on the south by the Lowry claim and on the west of C. J. Phenis farm.

Appraisement is hereby waived in any foreclosure proceeding together with all the privileges and appurtenances to the same belonging.

To have and to hold the same to the said party of the second part his heirs and assigns forever, and the said Mary B. Herbert and W. H. Herbert, husband and wife party of the first part, hereby covenant that they are well and truly seized of a good and perfect title to the premises above conveyed in the law, in fee simple, and have good right and lawful authority to convey the same, and the title so conveyed is clear, free and unincumbered, and that they will warrant and forever defend the same, to the party of the second part, his heirs and assigns against all claims whatsoever.

561 Provided always, and these presents are upon this express condition that if the said party of the first part, their heirs, executors and administrators, shall pay or cause to be paid to the said party of the second part, his heirs, executors, administrators or assigns, the just and full sum of one thousand dollars (1000.00) five years from date hereof, with interest thereon from October 21st, 1898 until paid at the rate of ten per cent. per annum, the same to be paid annually in advance, and if the interest is not paid when due the same is to bear interest the same as the principal, according to the provisions of one promissory note, bearing even date herewith, executed by the said Mary B. Herbert and W. H. Herbert, husband and wife, parties of the first part to the said party of the second part, and shall moreover pay annually to the proper officers all taxes which shall be assessed on the said real estate and shall deliver or exhibit receipts therefor to the party of the second part his heirs and assigns on or before the first day of May next after such taxes shall have become due and payable; and shall insure and keep insured the buildings thereon against loss by fire in the sum of two hundred dollars or over, in insurance companies to be approved by party of the second part his heirs or assigns, and the policy or policies of such insurance assigned as collateral thereto, and on the default thereof it shall — lawful for the said party of the second part his heirs or assigns to effect the insurances and the premium and premiums and other legal expenses, fees, costs and charges paid for the effecting of the same, together with interest thereon at the rate of ten per cent. per annum, shall be a lien upon the said mortgaged premises, added to the amount of the said one thousand dollars and

secured by these presents until the payment of said promissory not then these presents shall be null and void. But in the case of non payment of any sum of money (either of principal, interest, or taxes at the time or times when the same shall become due, or to insur and keep the policies assigned agreeably to the conditions of thes presents or of the aforesaid note or of any part thereof, or in cas of such failure to deliver such receipts, as above provided, or in cas of failure on the part of said party of the first part to keep or perfor any other agreement, stipulation or condition herein contained, the in such case the whole amount of said principal sum shall at th option of the said party of the second part, his representatives o assigns, be deemed to have become due and the same, with interes thereon at the rate aforesaid be collectable in a suit at law, or b foreclosure of this mortgage, in the same manner as if the whole o said principal sum shall have been made payable at the time whe such failure shall occur as aforesaid; and it shall be lawful in such for said party of the second part his heirs, executors, administrator or assigns, to grant, sell and convey said real estate with the appurtenances thereunto belonging, at public auction on vendue, and o such sale, to make and execute to the purchaser or purchasers hi her or their assigns forever, good and sufficient deed of conveyanc in the law pursuant to the statutes in such cases made and provided and out of the moneys raised from such sale to retain the principa and interest which shall then be due on the said promissory not together with the costs and charges, rendering the su-plus moneys if any there be, to the said party of the first part, their heirs or administrators, after deducting the costs of such vendue as aforesaid and in the case of the foreclosure of this mortgage, the said party o the first part for themselves, their representatives or assigns, do covenant and agree that they will pay the said party of the second party his representatives or assigns in addition to the taxable costs, in th foreclosure suit sixty dollars as solicitors fees.

In witness whereof the party of the first part have hereunto se their hand and seals this 24th day of October A. D. 1898.

MARY B. HERBERT.
W. H. HERBERT.

Signed, sealed and delivered in the presence of
W. T. LITTON AND
G. W. SUTTON.

552 TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

On this 26th day of October A. D. 1898 personally came befor me Mary B. Herbert and W. H. Herbert, known to me to be husband and wife, and to me known to be persons who executed th foregoing mortgage upon land known to be the homestead of th grantors, and acknowledged that they executed the same freely an voluntarily for the uses and purposes therein mentioned.

[SEAL.]
W. T. LITTON,
*Notary Public.*

My commission expires Jan. 30, 1899.

TERRITORY OF OKLAHOMA,
*County of Pawnee, ss:*

Received for record this 14th day of November, A. D. 1898 at 8:05 P. M. and recorded in Vol. (1) of mortgages in page 173. Fee $1.55.

[SEAL.] J. J. CORBUT,
*Register of Deeds.*

The original of this mortgage was accompanied by a plat of the land.
J. J. CORBUT,
*Register of Deeds."*

Exhibit "C" is as follows:

"This deed is left in the bank of Cleveland in escrow as security of a note and mtg., given by Mary B. Herbert to S. R. Wagg of Appleton Wis. W. T. Litton Csh.

Know all men by these presents that we, Mary B. Herbert, and her husband, W. H. Herbert, for and in consideration of the sum of One thousand ($1000.00) Dollars do hereby sell and convey to S. R. Wagg, the following real property situated in Pawnee county, south east quarter of section eight (8) township twenty-one (21) North of range eight (8) east of the I. M. more particularly described and bounded as follows, to wit:

On the north by the Joe Box place, On the East by the Town of Cleveland, on the South by the Lowery place, and on the West by the C. J. Phenis place, with all its appurtenances and warrant the title to same.

Signed and delivered this the 24th day of Nov. 1898.

MARY B. HERBERT.
W. H. HERBERT.

TERRITORY OF OKLAHOMA,
*Pawnee County, ss:*

Before me W. T. Litton, Notary Public in and for the above named county and Territory, on the 24th day of October, 1898, personally appeared Mary B. Herbert and husband and executed the above conveyance of land, to me known to be the homestead of the grantors and each for themselves acknowledged the execution thereof to be their free and voluntary act for the purposes named.

Witness my hand and official seal the date above written.

[SEAL.] W. L. LITTON, *Notary.*

My commission expires Jan. 30, 1899.

This deed is given to be held in escrow as additional security to grantee for a loan of $1000.00 this day loaned to the grantors and for which they have this day given the grantee a mortgage on the same land.

This instrument was filed 26th day of December, 1899, at 8 A. M. and duly recorded in book 1 of Deeds, page 329.

T. M. BROADDUS."

Territory of Oklahoma,
Pawnee County, Cancelled.
**Fee. $1.00.**

553 Exhibit "D" is as follows:

"SEPTEMBER 25, 1898.

W. H. Herbert, Cleveland, Oklahoma.

MY DEAR SIR: Yours of the 15th to hand and its satisfactory as a fair declaration to do and I have begun to see something of the drift of things. If you was in Wisconsin I would not hesitate a moment. I have no love for such men as you describe, & I would not. I have been made to hestitate on acc't of the possible future contingencies. I wrote Mr. Drown about a deed held in escrow against the possible interference or injunction proceedings that scheming men and lawyers trump up. I will bring the matter to a focus at once and make the loan or quit & call it off. You execute a warrantee deed to me to be placed in escrow, and held by the bank of Cleveland or A. A. Drown, in trust, for the fulfillment of the terms of the mortgage. In case you fail to fulfill the terms and are in default of interest or other terms for six months; then the deed is to be delivered to me or my order. The mortgage is for $1000.00. I will deduct the first year's interest $100.00, send $900.00 to the bank with instructions. This pays first year's interest, second year's interest is not due until the end of the second year and six months' grace on the end of this makes a full 2½ yrs., before you allow or I can ask for the deed in case of default of contract. I do this solely in the interest of protecting myself against injunctional and interference proceedings from interlopers and blackmailers—in case such an unpleasant things as foreclosure proceedings should ever be necessary. I do not expect such a thing to occur; if I did no loan would be made, but I am now looking to the extreme of the case and its easiest protection for me. You can ask Mr. Drown how I deal with men. I never knowing distress a man, & am not inclined that way, but want contracts lived up to. The papers you executed have not arrived here as yet to my knowledge. They will be all right when complete and I have examined them and all that will be necessary to execute the deed in connection with them and place them in hands of trustee as indicated above and for the purposes named. I trust this will meet your needs. On execution of papers you can have money. I shall be absent from home for ten days.

Yours, S. R. WAGG."

To this amended petition the defendant, S. R. Wagg, filed the following answer:

"First. Answering plaintiff's second amended petition herein, the defendant S. R. Wagg denies each and every material allegation therein, which is not herein explicitly admitted.

Second. This defendant admits the execution of each of the written instruments copies of which are attached to said second amended petition, and marked respectively "Exhibit "A," "B" "C" "D" and "E," but this defendant denies that said Exhibit "D" contains the terms and conditions of the escrow of the deed marked Exhibit "C" and further denies that either of the endorsements as to the purpose of the execution of Exhibit "C" were endorsed thereon at the time of the execution thereof or that they form any part of said instrument.

Third: This defendant specially denies all that allegation of said second amended petition, which reads as follows: "That in the taking possession of said Exhibit "D" and the said real estate in the negotiations looking to the redemption of said real estate from the said mortgage as embraced in all of said exhibits "A" "B" "C" and "D" all as herein alleged; that said Leroy M. Drown, acted with, for and in behalf of the said defendant S. R. Wagg, as his agent with full authority as such agent, and did in his capacity as such agent help, aid and abet the said S. R. Wagg in the doing of various things herein alleged to have been wrongfully done by the said S. R. Wagg."

554 Fourth. This defendant admits that subsequent to the delivery by the plaintiff to the defendant S. R. Wagg, of the deed of which Exhibit "E" is a copy, the defendant S. R. Wagg made and executed a plat of the fifty-five acres of land not embraced in said Exhibit "E" platting the same into lots, blocks, streets and alleys for townsite purposes, and named said plat Wagg's Addition to the Town of Cleveland, Pawnee county, Oklahoma Territory, and did subsequently and before this action was brought, proceed to sell some of these lots to innocent purchasers.

## II.

For a further and second defense to plaintiffs second amended petition, this defendant alleges that all the admissions and denials of the first count are true, and they are hereby referred to and made a part of this defense as though herein fully set out.

This defendant further alleges that at the time he demanded and took from escrow the warranty deed, a copy whereof is attached to plaintiff's petition, marked "Exhibit C," the said plaintiff and her husband W. H. Herbert, were in default of payment of the interest upon the loan secured by the mortgage, a copy whereof is attached to plaintiff's petition marked Exhibit "B" in the sum of One Hundred Dollars, and in addition thereto were in default of the payment of taxes for the year 1898, and the land had been advertised for sale for the taxes of 1898, and this defendant had been obliged to pay said taxes in the sum of $24.94 and accrued penalty and costs thereon in the sum of $3.86 in order to protect his aforesaid mortgage, and the said plaintiffs were wholly unable and unwilling to refund and repay said taxes and penalty or to pay said interest. That for these reasons the said defendant S. R. Wagg took the said deed from escrow and filed the same for record as an additional security for said loan and additional advances, and after placing said deed of record this defendant advised the said plaintiffs that they might still redeem the said lands from the said deed and mortgage, and repeatedly requested them to do so, and advised them by letter and otherwise that they might redeem said lands and that he would be willing to accept the payment of interest and additional advances and carry the loan according to its original terms, but said plaintiffs at all times failed to pay any part of said indebtedness and advances, and in May, 1900, at the request of the said plaintiffs made through W. L. Eagleton then and there their agent and duly authorized in that behalf, this defendant extended the time for payment of said advances and interest until October 1900, upon the express agreement that this defendant should have the hay crop growing upon said lands to put against and apply upon said advances, taxes and interest. This defendant in the meantime having paid an additional years taxes upon said property in the additional sum of $33.00 and penalty in the sum of $1.31. That in pursuance to said agreement, whereby said payments were extended until October 1900, this defendant did take a portion of the hay crop from said premises for the year 1900, and apply the same upon said advancements. Said hay crop was of the value of $20.00 and not more. This defendant never at any time took possession of any portion of said premises prior to the execution and delivery of the said deed mentioned in plaintiff's petition and described therein as "Exhibit E."

That after the expiration of the extension of time aforesaid, until October 1900, the said plaintiffs continually requested this defendant to further extend the time of payment and not foreclose upon said premises and this defendant during all said times was advising the said plaintiffs that they might redeem said lands from said indebtedness and mortgage and deed, and that this defendant would accept the payment of the entire indebtedness of the payment advances and accrued interest and continue the loan, but these plaintiffs were during all of said times unwilling to make any payments and were unwilling to keep up the taxes on said premises and to pay the same, as they were continually accruing, so that there had accrued as taxes for the year 1900, the sum of $26.34 with $1.36 as ad-
555 ditional penalty thereon which this defendant had paid in
order to protect his aforesaid mortgage. In the meantime there had accrued as additional interest due upon the 24th day of October, 1900, the sum of one hundred dollars. No part of said original indebtedness evidenced by said note nor any of the interest had ever been paid, nor had any of the aforesaid advances been refunded, and this defendant had been to large expenses in protecting his aforesaid interest and the lien of said mortgage so that in the winter of 1900-1901, and in the early spring of 1901, the plaintiff in writing requested this defendant to consent to accept a portion of the said lands in satisfaction of their aforesaid indebtedness to him. The said plaintiffs being at said time fully advised and knowing that the said mortgage and deed constituted but a mortgage and lien upon said premises, for the aforesaid indebtedness. This defendant at that time believed the said lands to be worth but little more than the amount due upon said indebtedness, and said plaintiffs offered to convey one half of said lands in satisfaction of said indebtedness, but this defendant was unwilling to accept the same as he believed one half of the lands to be worth much less than the amount of the indebtedness, but upon the repeated solicitation of said plaintiffs, this defendant finally consented to settle the said indebtedness by taking a conveyance of said lands and re-conveying twenty-five acres of said tract to the plaintiff Mrs. Mary B. Herbert, the said agreement being entered into by this defendant at the solicitations of these plaintiffs, and as an accommodation to plaintiffs to save them of the

expense of a foreclosure of said mortgage and the entire loss of said lands, and in said agreement the said defendant allowed for the said fifty-five acres retained by him, more than its value at that time and said transaction was entirely without oppression upon the part of this defendant and without any undue influence upon the part of the defendant. And in entire good faith this defendant cancelled the securities and all the indebtedness of the said plaintiffs to the said defendant. Said agreement was executed and carried out by the necessary conveyances, copies of which are attached to plaintiffs petition and marked respectively exhibits "E & F," and that to induce this defendant to execute said agreement and accept said conveyance, the plaintiff Mary B. Herbert represented that she believed her husband to be dead, and that she had not heard from him for a long time and did not know of his whereabouts. Said conveyances were executed on the 28th day of May, 1901. That after the aforesaid settlement and after the execution of the aforesaid conveyance and up until the present time, the said plaintiff Mary B. Herbert has resided upon the twenty-five acres conveyed to her by said deed marked "Exhibit F" and had had full notice and knowledge during all of said time of all the acts of this defendant with reference to said lands, and has had full knowledge and notice of all the improvements constructed on said premises by other persons grantees of this defendant as hereinafter stated, and has during all of said time known of the platting of said lands and of the expenditures of large sums of money by defendant in surveying, platting and improving said lands and never at any time prior to the bringing of this action, had she or any one in her behalf, or had either of the plaintiffs ever expressed any dissatisfaction with the aforesaid settlement, but subsequent to the aforesaid settlement, the said Mary B. Herbert thanked this defendant in writing for his kindness to her in making said settlement and accepting a portion of said lands in satisfaction of his said debt and had repeatedly expressed her pleasure and satisfaction with said settlement and did on the 6th day of July, 1901, agree in writing to procure the signature of the aforesaid W. H. Herbert to the aforesaid conveyance marked "Exhibit E" in the event that the said W. H. Herbert should be alive, and which agreement is hereto attached marked "Exhibit A" and made a part hereof, and the said Mary B. Herbert thereby acquiesced and affirmed the aforesaid settlement and conveyance. Said agreement being executed for the purpose of quieting any question as to the title of said lands and to enable this defendant to sell the same without question as to title. The question having been suggested that perhaps said Mary B. Herbert could not lawfully convey said lands unless joined in the deed by her husband.

556 That in reliance upon the aforesaid conveyance and the affirmance thereof and in good faith and fully believing that he had paid adequate and full consideration for the aforesaid fifty-five acres of said land, and that plaintiff was fully satisfied therewith, this defendant took possession thereof, expended large sums of money in improving the same and laying out and surveying and platting the same as an addition to the Town of Cleveland, adjoining which

said lands are located, and thereafter this defendant sold large tracts and bodies of said lands to the other defendants in this cause and to their grantors all of whom were purchasers for a valuable consideration and without notice of any claim of the said Mary B. Herbert, or either of the plaintiffs herein.

That this defendant is still the owner of all the said fifty-five acres of land not conveyed to purchasers in good faith or for a valuable consideration and without notice of any claim by the said plaintiffs or either of them adverse to this defendants fee simple title, that the defendant paid all the taxes on said land for the year 1901, in the further sum of $33.14, together with 46¢ penalty. That plaintiffs nor either of them, prior to the bringing of this action paid any taxes on said fifty-five acres of said land, nor exercised any act of ownership over any part thereof after the execution of the aforesaid deed and mortgagee marked Exhibit "E" and neither of them claimed at any time to be the owners of any portion of said tract prior to the bringing of this action; never at any time offered to reimburse this defendant for any of the taxes which he had paid or laid out in that behalf or to pay him any of the original indebtedness or interest thereon, but claimed to exercise rights of ownership in the twenty-five acres by him conveyed to the said Mary B. Herbert free and clear of this defendant's aforesaid deed and mortgage and did convey large tracts of the same by deed of general warranty to other and *bona fide* purchasers and did appropriate the proceeds thereof to their own use and benefit, said conveyance being made subsequent to defendants' conveyance to Mary B. Herbert in the aforesaid final setlement, whereby the said Mary B. Herbert affirmed the aforesaid settlement and conveyance in settlement. During all the time after the aforesaid conveyance marked Exhibit "E" this defendant was continually selling portions and tracts of said lands to innocent purchasers for value who were continually erecting extensive and valuable improvements upon said land and improvements worth very much more than the lands upon which they were erected and very much more than the whole tract of land, all of which facts the said Mary B. Herbert was at all time cognizant of and in which she acquiesced and against which she never made protest or objection although during all the said time residing and in plain view thereof and within a half mile thereof. That at the time of the settlement of this plaintiff and defendant and at the time of the execution of the conveyances marked Exhibits "E & F" the said lands was of little value, was adjoining the town of Cleveland, Pawnee county, Oklahoma Territory, aforesaid, and which said Town did little business, was without a railroad, was twenty-four miles from county seat, and had but small trading territory tributary thereto and the commercial prospects for the said Town were not good and the prospects for the increase of said Town or the development of said Town were not good and the — had no immediate prospects of a railroad and the said Town was difficult of access. That by the platting of said lands and the surveying thereof and the laying the same out as an Addition to the Town, their value was materially increased, and that by the construction of dwellings and buildings thereon prior to the bringing of this action, their value was much more increased and that the commercial outlook for the said Town before the bringing of this action had become much brighter, the permanent survey of the Missouri, Kansas and Texas Railway was extended through the said Town upon the main line extending from Kansas City, Missouri to Oklahoma City, Oklahoma and likewise the St. Louis and San Francisco R. R. had definitely located its line of railway to join the said Missouri, Kansas & Texas Railway with the county seat of said Pawnee county and a few miles distant from said Town, and the said lines of railway were in actual course of construction, and since the institution of this action have been built and by 557 reason of the premises and for other reasons the value of the aforesaid property prior to the commencement of this action had increased (in value) to more than ten times its value at the time of the aforesaid conveyance; and since the commencement of this action it has increased in value many hundred times its value at the commencement of this action, and the plaintiff herein Mary B. Herbert, having acquiesced in the aforesaid settlement and conveyance which were in all things fair, reasonable and just, and having permitted the expenditures by this defendant of large sums of money in the improvements of the said lands and having slept upon her rights in the premises from the date of the execution of said said Exhibit "E" until the commencement of this action, for a space of more than two years, and having confirmed the aforesaid settlement and conveyance by agreement to procure the signature of her aforesaid husband W. H. Herbert to the conveyances of this defendant, and by conveying land free from the lien of this defendant's mortgage, and which she did by virtue of said settlement, she is now estopped from asserting right, title, interest or equity in or to the said lands or any part thereof.

Wherefore, this defendant prays that she take nothing by her action; that defendant recover his costs herein, and that said plaintiff be forever barred of all right, title, interest or equity in or to said lands or any part thereof, and that she be enjoined from in any manner asserting the same, and that this defendants title in and to the above mentioned fifty-five acres of land be quieted as against all claims of the plaintiff and any and all other persons claiming by, under or through her, and that this defendant have such other and further relief as is consistent with equity and good conscience."

To this answer of S. R. Wagg the plaintiff filed a reply, consisting of a general denial.

Upon the issues thus joined the cause was tried to the court without a jury, and after a large volume of evidence was submitted by both parties to the action, the court found the issues in favor of the plaintiff and against the defendant, S. R. Wagg. And the Court thereupon adjudged and decreed that the deed executed by Mary B. Herbert on May 28, 1901, to be a mortgage upon the land described in the plaintiff's petition, and that the mortgage be declared a lien upon said property for the principal sum of one thousand dollars, with interest as stipulated in the mortgage bearing date October 24, 1898, executed by Mary B. Herbert and W. H. Herbert, and subject also to the further provisions of said mortgage, a copy of which is attached to plaintiff's petition. It was further decreed that the plaintiff be reinvested with title to said property, subject to said mortgage lien and for taxes and expenses properly incurred, and that an accounting be had between the plaintiff Mary B. Herbert and the defendant S. R. Wagg, for the purpose of determining the amount of moneys received by Wagg for the lots sold by him and money received from said property, and that in case the defendant Wagg has received from the sale of said property and products of said land a sum in excess of that which is due him under the findings and judgment of the court, that judgment be rendered for such sum in favor of the plaintiff and against the defendant. It was further decreed that a referee be appointed for the purpose of taking the testimony and determining the questions arising on the accounting between the plaintiff and defendant Wagg, and to ascertain what land or lots were sold to *bona fide* purchasers prior to the institution of suit, and also find what lots were not sold, and that all parties who were not made defendants in this action or claiming any interest in the property or lots in the Wagg addition, should have a right to intervene to have their rights determined in this action, and that the rights of subsequent purchasers through and under Wagg be determined, and for costs of this action. To which findings, judgment and decree of the court the defendant Wagg duly excepted, and which exception was allowed.

558 Thereupon, within time, the defendant, Wagg, filed his motion for new trial and asked for a reversal on the following grounds:

First. Because said judgment is not sustained by sufficient evidence.

Second. Because said judgment is contrary to law.

Third. Because of errors of law occurring at the trial and excepted to by the defendant S. R. Wagg at the time.

Fourth. Because the court admitted testimony over the objections of the defendant S. R. Wagg to which he at the time duly excepted.

Fifth. Because the court refused to admit testimony offered by the defendant S. R. Wagg, which refusal was at the time excepted to by the defendant S. R. Wagg.

This motion after being duly considered by the Court was overruled and exception noted, and the defendant, S. R. Wagg, brings the case here for review.

Opinion of the Court, by HAINER, *J.*:

It is the contention of the plaintiff in error that the petition, if all the facts were admitted, does not state facts sufficient to constitute any right to relief. It is further contended that the evidence does not sustain the allegations of the petition fairly construing the most adverse testimony and taking it as uncontradicted. Plaintiff in error further contends that even if plaintiff below had made out a case on her petition and evidence, that the unquestioned and undisputed facts show a complete defense. These contentions in our opinion are clearly untenable. The evidence in this case discloses that after some extended negotiations between W. H. Herbert and his wife, Mary B. Herbert and the plaintiff in error, S. R. Wagg the plaintiff secured a loan from Wagg for $1000, and as evidence of such indebtedness executed to Wagg a promissory note dated October 24, 1898, payable 5 years after date, with interest payable annually in advance. Wagg deducted $100 from the principal sum loaned, being one year's interest. To secure the payment of said note, W. H. Herbert and his wife, Mary B. Herbert, executed a mortgage upon 80 acres of land adjoining the town of Cleveland. At the time of the execution of the mortgage and as further security therefor and in accordance with the previous negotiations, Herbert and his wife executed a warranty deed to the premises, said deed to be deposited in escrow with the Bank of Cleveland, and to be delivered to Wagg upon breach of the terms of the mortgage.

The following letters from S. R. Wagg to W. H. Herbert and Mary B. Herbert, will shed some light upon these transactions, and are, we think, very material to the determination of the rights of the parties. One of these, dated Appleton, Wis., September 25, 1898, appears upon page 55 of the record, and reads as follows:

"APPLETON, WIS., *Sept.* 25, 1898.

W. H. Herbert, Cleveland, Okla.

MY DEAR SIR:—Yours of the 15th at hand and its satisfactory as a fair declaration to do, and I have began to see something of the drift of things. If you was in Wisconsin I would not hesitate a moment. I have no love for such men as you describe and would not. I have been made to hesitate on account of the possible future contingencies. I wrote Mr. Drown about a deed held in escrow against the possible interference or injunction proceedings
559 that scheming men and lawyers trump up. I will bring the matter to a focus at once and make the loan or quit and call it off.

You execute a warrantee deed to me to be placed in escrow and held by the Bank of Cleveland or A. A. Drown in trust for the fulfillment of the terms of the mortgage in case you fail to fulfill the terms and are in default of interest or other terms for 6 months; then the deed is to be delivered to me or my order. The mortgage is for $1,000.00. I will deduct the first year's interest, $100 and send $900.00 to the bank with instructions. This pays one year's interest. The second year's interest is not due until the end of the second year and six months grace on the end of this makes a full 2 & ½ years before you allow or I can ask for the deed in case of default of contract.

I do this solely in the interest of protecting myself against injunctional and interference proceedings, from interlopers and blackmailers—in case such an unpleasant thing as foreclosure proceedings should ever be necessary. I do not expect such a thing will ever occur. If I did no loan would be made, but I am now looking to the extreme of the case, and its easiest protection for me. You can ask Mr. Drown how I deal with men. I never knowingly distress a man and am not inclined that way but want contracts lived up to.

The papers you executed have not arrived here as yet to my knowledge. They will be all right when completed and I have examined them and all that will be necessary is to execute the deed in connection with them and place in the hands of trustee as indicated above for the purpose named. I trust this will meet your views. O execution of papers you can have money.

S. R. WAGG."

On page 56 of the record appears the following letter from Wag to the Bank of Cleveland:

"APPLETON, WIS., *Sept. 30th,* 1898.

Bank of Cleveland, Oklahoma.

GENTLEMEN: Referring to your letter of Sept. 9, 1898 on th Herbert loan; I enclose you $900.00 to perfect the loan after clear ing the title perfectly as stated you are willing to do and you ar only allowed to pay any money until all liens are paid and the mort gage is recorded wrote and sent; and not until then. This appl money in payment of prior mortgages or liens and clear and perfe title to me so I am first lien and have the money applied as purchas money on the records in liquidating prior cl*ia*ms. There must b also attached to this mortgage the abstract of title under recorder' seal. Map references by name where 80 is located, meets an bounds inserted in the mortgage locating the land so you know it i the indentical 80 near Mr. Drown's store, also register's certificat that my mortgage is first lien the title having been cleared and no rests on my mortgage. You are instructed to consult with M Eagleton, Pawnee my paid attorney in this matter; let this in n way affect you in carrying out instructions except to work ha moniously to protect my interests. You also to write me the strong est form of promissory note suitable to attach to the mortgage an payable to my order at your Bank. I have also asked Mr. Drown t look over the papers and description of land and locate in my inte est and to ask you to let him read this letter. A Waiver Clause o foreclosure is also inserted in the mortgage, written on the Wiscons form asking that you carefully protect my interests in the transa tion and anything I have omitted to do to notify me before actin further. Charge Herbert for the work in getting ready the pape for delivery to me with clear title. For handling the money an paying him send the bill to me. I shall want you to collect intere when due with him and future loans.

560 All done pay balance to Herbert. Mrs. W. H. have wi ness to the note.

Yours truly, S. R. WAGG.

To Bank of Cleveland, Oklahoma. You hold the deed in escrow.

And on page 60 of the record appears the following letter fro Wagg to the Bank of Cleveland:

"APPLETON, WIS., *Nov. 8th,* 1898.

Bank of Cleveland, Okla.

GENTLEMEN: You are herewith instructed to deduct your bill of $3.45 from the $900.00 sent you on account of Herbert loan and return balance to $896.55 to me, unless Mr. Herbert and wife at once properly execute the mortgage deed (warrantee) I sent you; and deposit a warrantee deed in escrow with you as trustee; further securing the loan; all as instructed in my prior letters, you to see a clear and full description of the land on limits and boundaries is inserted in mortgage fixing the identity of the land lived on together with an insurance on the house assigned as additional security; all former instruction not in accordance with the above is hereby withdrawn. Your action is requested with bill of services.

Yours truly,

S. R. WAGG."

It seems from the evidence that a misunderstand- arose between Wagg and the Herberts with reference to the time of the payment of the second installment of interest. It will be observed that Wagg in his letter dated September 25, 1898, stated as follows: "The mortgage is for $1000.00. I will deduct the first year's interest, $100. and send $900.00 to the bank with instructions. This pays one year's interest. The second year's interest is not due until the end of the second year and six months grace on the end of this makes a full 2 & ½ years before you allow or I can ask for the deed in case of default of contract." Notwithstanding this letter, Wagg insisted that the interest was due and payable on the 24th of October, 1899, and in response to his letter demanding the second installment of interest W. H. Herbert writes the following letter, dated October 25, 1899, to Wagg, and which appears on page 64 of the record:

"CLEVELAND, O. T., *Oct.* 25, 1899.

Mr. S. R. Wagg.

MY DEAR SIR: I received an order from you to pay Mr. L. M. Drown $100.00 due, as interest, by the terms of your last letter to me, I have been led to suppose I had considerable time yet, and it caught me by surprise. I can usually furnish $100.00 at short notice.

The deal from which I can spare the money will not be consummated for two weeks. I ask extension for that time. I send you copy of the letter that I have been governed by, and which I presume has misled me.

Letter from you, after some preliminaries you write, the mortgage is for $1000.00. I will deduct the first year's interest $100.00 send $900 to the bank with instructions. This pays first year's interest. The second year's interest is not due until the end of the second year, and six months grace on the end of this makes a full two and one-half years before you allow, or I can ask for the deed in case of default of contract.

This is a copy of your letter that I have been governed by and it seems it has misled me.

I am,

Very truly yours,

W. H. HERBERT."

561 It will be observed that in this letter Herbert calls the
tention of Wagg to the contents of his letter dated Septemb
25, 1898, in reference to the time of the payment of interest.

On November 1, 1899, Wagg wrote Herbert the following lett
which appears on page 65 of the record:

"APPLETON, WIS., *Nov.* 1*st*, 1899

W. H. Herbert, Cleveland, Okla.

MY DEAR SIR: Your letter of recent date at hand, and not
We had considerable correspondence prior to the mortgage contra
When the contract is completed and signed that is the agreeme
It would be convenient to have the money to use; but if you
hard pressed for money I shall not think of distressing you.
about all I want is security that is safe and does not worry
When you get it pay Mr. Drown with deferred interest and get
receipt sent. With best wishes,

Yours truly, S. R. WAGG."

The Herberts, not having paid the second year's interest at
time Wagg demanded the same, Wagg procured the deed from
Bank of Cleveland, and caused it to be placed on record on Dec
ber 26, 1899, in the office of the register of deeds of said county,
thereafter Wagg claimed to be the owner of said property by vi
of said deed.

And on February 17, 1900, he wrote his agent, Drown, the
lowing letter, appearing on page 78 of record, authorizing his ag
to collect the rents, etc.:

"APPLETON, WIS., *Feb.* 17, 190

Mr. Leroy Drown, Cleveland, Okla.:

You are hereby authorized to act as my agent in looking after
lands and tenants on the Herbert property at Cleveland, Okla.
lect rents monthly, sell the hay crop standing if possible and re
to me once in three months and keep me advised of any chang
interest from time to time.

Deposit all proceeds in Bank to my credit.

Yours truly, S. R. WAGG

And again on February 27, 1900, Wagg authorized his ag
Drown, to take possession of the premises in accordance with
following letter, which appears on page 79 of the record:

"You take possession of all vacant houses, or have it done for
on the Herbert place; and rent them as best you can. Don't let
squatters get back. They are easy rid of now. Keep rid of th
and don't let a person in except on a good lease, so you can get
out without expense. Herbert we will treat generously. I
him well.

Yours, S. R. WAGG

On April 14, 1900, Wagg wrote Herbert and his wife the fo
ing letter:

"APPLETON, WIS., *April* 14, 1900.

W. H. Herbert and wife, Cleveland, Oklahoma:

I expect to be in your city or town in the near future and in as much as the loan of October 1898 is in default of payment of interest, and the 6 months allowed you as grace in which to make 562 it good expires during the month of April 1900, I ask that you make up all payments due to date either to me or place to my credit in Bank of Pawnee subject only to delivery of my receipt for same, otherwise the title to the Cleveland homestead will by virtue of our agreement and papers of record, pass to my ownership and control. I hope you will pay up past dues and notify me of action you take in the matter. I am

Yours truly, S. R. WAGG."

And on April 30, 1900, Wagg wrote Herbert as follows:

"APPLETON, WIS., *April* 30, 1900.

W. H. Herbert, Wichita, Kansas.

MY DEAR SIR: Your letter of the 27th at hand. I was obliged by circumstances you made, to put my deed on record, allowing the property to be offered at tax sale. I sent money to pay them.

I do not propose to be hasty or unfair, if you want to pay the interest up, you can do so, I have not asked for any full payment of principal, the interest will do— I had not intended to foreclose or turn you out of the house, and shall not unless you fail to do anything. I expect the hay crop will help pay the interest. I shall trust you for it. I shall expect to be in Cleveland but do not go to the expense to see me. If you are there, I shall be glad to see you.

Yours truly, S. R. WAGG."

On July 12, 1900, Mrs. Herbert wrote Wagg the following letter, which appears on pages 85 and 86 of the record:

"CLEVELAND, OKLA., *July* 12, 1900.

Mr. S. R. Wagg, Appleton, Wis.

DEAR SIR: I write believing you will see the justice of the request I am about to make. The anxiety I suffer in regard to my home in undermining my health. The conditions of the land precludes the possibility of my using it to the benefit of myself and children. I wish you to have the equivalent of the rent in land if I do not get the money to pay you, but I do not wish to give double and since you have seen the land you must recognize it is more valuable than the amount you have in it. I wish to know if you would take half the land for the debt? The half next to Cleveland, which is the more valuable, I presume. I wish to have the other free from incumbrance to cultivate for a living for my children. If you are not willing to do this would you allow me to sell forty acres, which I can do, to cancel the indebtedness; that is, to obtain a purchaser, the money to be paid to you? When you was here you said you did not want the land, you only wanted your money which I am anxious for you to have. I write this knowing you could not

possibly in justice to your ideas of right, take all the land for t
debt, especially as I am not responsible for it and I would nec
sarily be the chief sufferer. If you accede to this request you w
remove a great burden from me and I can proceed to arrange
have the forty acres broken this fall in readiness for cultivation
the spring. The home is so much more to me than the money c
possibly be to you; however, I am sure you will understand I des
to settle the affair in justice to us both. I wish you to have yo
money or its equivalent in land, but I do not want to lose my hon
Half of the land means a home to me and support for myself a
family, to lose it means to us to be homeless. I present the matt
thus plainly that you may realize what is involved in it to me, hen
it seems to me the only just way to us both, to settle t
563 affair, under the circumstances, is to divide the land.
mean, of course, if we should be disappointed and be unal
to get the money for you before the expiration of the time you ha
extended. I think I will have it, but as there are few things ab
lutely certain in life and desiring so much for my health's sake,
be relieved of the strain in connection with the matter. I appeal
you, believing you will be disposed to show the same mercy y
would like shown to yourself or loved ones.

Hoping to be favored with an early reply, I am,

Very respectfully, (MRS.) W. H. HERBERT."

To this letter Wagg replied as follows, on July 18, 1900:

"APPLETON, WIS., *July* 18, 1900.

Mrs. W. H. Herbert, Cleveland, Okla.

MY DEAR MADAM: Your favor of the 12th is before me, in re
will say I do not incline to a division of the land; but under
condition I will deed back to you the land for $1300.00 October
Nov. next as you can arrange, the back interest, taxes, expen
incurred and holding the princip*le* five months before loan w
closed amounts in all to $1280.00 and as the loan is for five yea
it is a concession I would not make with a business man and o
do it to you as your situation merits some consideration, so I
this for immediate action and acceptance on your part—notify
of your intention in the matter.

Yours Resp'y, S. R. WAGG."

And again on August 11, 1900, Wagg wrote Mrs. Herbert
follows:

"APPLETON, WIS., *Aug.* 11*th*, 1900.

Mrs. W. H. Herbert, Cleveland, Okla.

DEAR MADAM: Your favor of some weeks ago, asking for
reconsideration of my declining to divide the land came to ha
and is noted. On payment of $1300.00 October or Nov. 1st, 19
I will quit claim deed to you or your purchaser one half the H
bert Homestead deed to me and deed the remaining half farth
from or west of Cleveland to your two boys jointly reserving to y
a life interest in the same; provided you explain clearly and sa

factorily to me how and by what means W. L. Eagleton obtained title to the house located on the said homestead and is now renting and claims to rights of a property holder to do so and collect rents—If anything is done would like to close it up entirely—I never had thought of turning you out and do not expect ever to do such a thing. Awaiting your further communication, I am,

Yours truly, S. R. WAGG."

On August 19, 1900, Mrs. Herbert wrote Wagg in part as follows: "Your letter of the 11th inst. has been received. I thank you for your consent to a division of the land. The way you propose to deed it is an advantage in some respects and a disadvantage in others from my point of view. I have not yet decided which out weighs the other, however we can speak of this later if desired. I was hoping you would not only agree to a division, but that you would decide to retain the forty acres, because if you would hold it for a year or two I could redeem it with interest on the investment: in other words buy it back for you if you wished to sell it, whereas if it is sold to another party would possibly not have an 564 opportunity to redeem it."

September 15, 1900 Wagg wrote Mrs. Herbert as follows:

APPLETON, WIS., *Sept.* 15, 1900.

Mrs. W. H. Herbert, Cleveland, Okla.

DEAR MADAM: I am in receipt of a letter from L. M. Drown regarding an answer to your last letter replying to mine of August 11th, I did not think an answer necessary. However you can go ahead and find a purchaser at $1300.00 for the east ½ (Half) and I will deed the other half jointly to your two boys, giving you the first right to the income from the same in form of a life interest. This places it beyond the power of any one to scheme you out of it. I make this offer solely in the interest of yourself and your boys. I reserve the right of one acre on the east side, near Mr. Drown's store for warehouse purposes, same to be located when deed is made.

I hope you may be able to realize your wishes in securing a home for yourself and boys. If you cannot make this sale, I will devise another plan later.

Yours respectfully, S. R. WAGG."

On December 24, 1900, Wagg wrote Mrs. Herbert the following letter, which appears on pages 95 and 96 of the record:

"APPLETON, WIS., *December 24th*, 1900.

Mrs. Mary B. Herbert.

MY DEAR MADAM: Referring to your last communication, wherein you wanted time to sell extended to Jan'y 1901 I hope you have been able to find a buyer. However, you can have until March 1st next if you need such time.

If you should feel like making a division of the land as a final settlement of the matter and passing deeds although I hold a deed of it all and under our agreement it all is now conveyed to me, ye I shall not use any rights I may have harshly but shall deed to yo and your boys a piece of the land preferably on which the hous is located so you may still live there and have the land to cultivat for your support. You talk it over with Mr. L. M. Drown and hav him write me.

I remain, yours respectfully, S. R. WAGG."

Another question which we must briefly notice in connection wit this transaction is, whether the consideration was adequate to induc a fair sale and settlement of the indebtedness existing between th parties. There was evidence offered on behalf of the plaintiff tha there was gross inadequacy of consideration, and that the reasonabl value of the property was several times in excess of the amount o indebtedness at the date of the execution of the deed dated May 28 1901. The witness Lytton testified, on page 135 of the record, tha the reasonable market value of the land was about $100 per acr at that time. The witness Skinner testified on page 248 of the recor that the fair value of the land would be from $50 to $100 per acre and the witness Crismon, on page 257 of the record, testified tha the reasonable market value of the land would be $100 per acre a the date of the execution of said deed. On the other hand, th witnesses on behalf of the defendant testify that the land was wort at that time about $25 per acre. So upon this question the evidenc was clearly contradictory.

565 It appears from all the evidence introduced, and it is con ceded in the brief and argument of counsel for plaintiff i error, that the escrow deed was merely a mortgage given as addi tional security for the payment of the debt. It further clearly ap pears that the first year's interest was deducted from the loan, an that according to Wagg's letter to the Herberts the second instal ment of interest would not be due until the end of the second year,— but this was in contravention of the express terms of the note an mortgage, hence the note and mortgage must govern in that respec However, we think it sufficient to mislead the Herberts in respe to the time the interest became due, and that it was but fair an reasonable that extended negotiations would follow in respect ther to. But upon the undisputed testimony, Wagg committed a frau upon the rights of the Herberts when he procured the escrow dee from the bank and had it placed on record on December 26, 189 and when he claimed title thereunder. Assuming that the secon installment of interest was due on October 24, 1899, and that the was a default in the payment of the interest on December 26, 189 yet under the express terms of the escrow deed it could not be with drawn and placed upon record until six months had expired fro the date of the default in interest on October 24, 1899. But eve if he had a right to place the escrow deed on record, it could onl amount to a mortgage and as additional security for the payme of the indebtedness existing between Wagg and the Herberts. H had no right to claim title thereunder, and he was not entitled take possession of the premises and collect the rents, etc., as th evidence clearly establishes in this case.

To insist that the escrow deed was an absolute conveyance which divested all plaintiffs' title and interest in the property, and to take possession of the property and collect the rents, clearly constitute in equity a fraud upon the rights of the Herberts; and the taking of possession of the premises, collecting the rents, claiming title to the land, and the securing of the deed dated May 28, 1901, was not only taking undue advantage of the mortgagors, but was an unfair and unconscionable transaction which cannot be upheld by a court of equity.

It must therefore follow as an irres-tible conclusion that the allegations in the petition of fraud, oppression, undue influence and inadequate consideration were fully sustained by the evidence, and we are unable to perceive how the trial court could have reached any other fair, just and rational conclusion upon the entire evidence as disclosed by this record.

It is a settled rule of this court, and one which we have reiterated and reiterated time and again, that where the evidence reasonably sustains the finding and judgment of the court, or where the evidence is conflicting, it will not be disturbed by this court.

The law of this case is so well settled by the authorities that we deem it necessary to refer to only a few of the leading cases, which we regard as peculiarly applicable to the facts of this case and as decisive of every question arising herein. The leading decision on this class of cases is Russell *v.* Southard, 12 Howard, 139, decided by the Supreme Court of the United States as early as 1851. In this case it was held that "To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practised, under the shelter of any written papers, however precise and complete they may appear to be. In Conway *v.* Alexander, 7 Cranch, 238, C. J. Marshall says: 'Having made these observations on the deed itself, the court will proceed to examine those extrinsi*x* circumstances, which are to determine whether it was a sale or a mortgage;' and in Morris *v.* Nixon, 1 How. 126, it is stated: 'The charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face.'

566 These views are supported by many authorities. Maxwell *v.* Montacute, Precedents in Ch. 526; Dixon *v.* Parker, 2 Ves. Sen. 225; Prince *v.* Bearden, 1 A. K. Marsh. 180; Oldham *v.* Halley, 2 J. J. Marsh., 114; Whittick *v.* Kane, 1 Paige, 202; Taylor *v.* Luther, 2 Sumner, 232; Flagg *v.* Mann, *ibid.* 538; Overton *v.* Bigelow, 3 Yerg. 513; Brainerd *v.* Brainerd, 15 Conn. 575; Wright *v.* Bates, 13 Verm. 341; McIntyre *v.* Humphries, 1 Hoff. Ch. R. 331; 4 Kent, 143, note A, and 2 Greenl. Cruise, 85, note."

And again in this case it is stated: "But the inquiry still remains, what amounts to an allegation of fraud, or of some vice in the consideration—and it is the doctrine of this court, that when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as a payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage; and we know of no court which has stated this doctrine with more distinctness, than the court of appeals of the State of Kentucky. In Edrington *v.* Harper, 3 J. J. Marshall, 355, that court declared: 'The fact that the real transaction between the parties was a borrowing and lending, will, whenever or however it may appear, show that a deed absolute on its face was intended as a security for money; and whenever it can be ascertained to be a security for money, it is only a mortgage, however artfully it may be disguised.' "

Upon the question of consideration, this doctrine is announced in this opinion: "In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practised, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject, great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold. Conway *v.* Alexander, 7 Cranch, 241; Morris *v.* Nixon, 1 How. 126; Vernon *v.* Bethell, 2 Eden, 110; Oldham *v.* Halley, 2 J. J. Marsh., 114; Edrington *v.* Harper, 3 *ibid.* 354."

Upon the question of assent to the sale, the learned court says: "It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. 'Necessitous men,' says the Lord Chancellor, in Vernon *v.* Bethell, 2 Eden, 113, 'are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.' "

In conclusion, the learned court says: "The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

And again, in speaking of the rights of the mortgagee with reference to the extinguishment of the equity of redemption of the mortgagor, the court says: "A mortgagee in possession may take a release of equity of redemption. Hicks *v.* Cook, 4 Dow, P. C. 16; Hicks *v.* Hicks, *et al.* 5 Gill & Johns. 85. But such a transaction is to be scrutinized, to see whether any undue advantage has been taken of the mortgagor. Especially is this necessary when the mortgagee, in the inception and throughout the whole conduct of the business, has shown himself ready and skillful to take advantage of the necessities of the borrower. Strong language is used in some of the cases on this subject. It was declared by Lord Redesdale,
567 in Webb *v.* Rorke, 2 Sch. & Lef. 673, that 'courts view transactions of that sort between mortgagor and mortgagee with

considerable jealousy, and will set aside sales of the equity or redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given.' And Chancellor Kent, in Holdridge *v.* Gillespie, 2 Johns. Ch. R. 34, says, "The fairness and the value must distinctly appear.' Wrixon *v.* Cotter, 1 Ridg. 295; St. John *v.* Turner, 2 Verm. 418. But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially, if the latter be in needy circumstances, the purchase by the former of the equity of redemption, is to be carefully scrutinized, when fraud is charged; and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase."

It will thus be seen that it is not necessary to establish actual fraud, but only constructive fraud, and that an unconscientious advantage was taken of the borrower. We think that in this case the evidence not only clearly proves constructive fraud, but it also clearly proves actual fraud, oppression, undue influence and unconscientious advantage, and in addition thereto inadequate consideration.

But the plaintiff in error, on page 51 of his brief, makes the following remarkable statement: "But the claim of plaintiff in error was right, as a matter of law, or else the Supreme Court of California on a statute identical with ours, did not know the rights it was attempting to adjudicate, in Bradbury *v.* Davenport *et al.*, 52 Pac. 301." We have examined this authority, and an examination of the same discloses the following sentence, immediately following the quotation in the brief of counsel for plaintiff in error.—"But, under the facts found, we are unable to perceive wherein the transaction is to be distinguished in any material respect from that sustained in Watson *v.* Edwards, 105 Cal. 70, 75, 38 Pac. 527, and in McDonald *v.* Huff, 77 Cal. 279, 19 Pac. 499, nor in fact why the question is not in effect concluded by what is said on the same subject on the former appeal. Bradbury *v.* Davenport, 114 Cal. 593, 46 Pac. 1062.

In Watson *v.* Edwards it was held that section 2889 of the Civil Code does not affect or refer to a subsequent contract between the mortgagor and mortgagee in respect to the title to the mortgaged premises, and it is said: 'A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, *where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee.*'"

The italics are ours. We concur with this doctrine announced by the California court, which counsel states is based upon a statute identical with ours. It will thus be seen that the doctrine announced by the California courts is in full harmony with the doctrine announced by the Supreme Court of the United States in the case of Russell *v.* Southard, *supra*, and in harmony with the views herein stated. It holds, as all the courts hold, that a mortgagee may purchase from the mortgagor if the transaction is fair, honest and without fraud or undue influence, and where no unconscionable advantage is taken by virtue of the relation existing between the mortgagor and mortgagee. But upon the issue of fraud, undue influence and unconscionable advantage, the trial court found the issues in favor of the plaintiff and against the defendant, and such finding and judgment of the court upon the evidence adduced is conclusive upon this court, there being ample evidence to sustain such finding and judgment.

In Vance *v.* Anderson, 45 Pac. 818, the supreme court of California has stated the doctrine as follows: "A deed absolute on its face may be shown by parol to be intended as a mortgage. It may be stated as a general proposition, that in this state, at least, every conveyance of real property made as security for the performance of an obligation is in equity a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in
568 which the transaction is clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement'; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject matter, are subjects for consideration. Campbell *v.* Freeman, 99 Cal. 546, 34 Pac. 113; Pierce *v.* Robinson, 13 Cal. 116 Locke *v.* Moulton, 96 Cal. 21, 30 Pc. 957; Ross *v.* Bruisie, 64 Cal. 245, 30 Pa. 811; Taylor *v.* McLain, 64 Cal. 513, 2 Pac. 399."

In Bradbury *v.* Davenport, *et al.*, 45 Pac. 1062, on appeal to the supreme court of California for the first time, the following doctrine is announced: "A conveyance of the mortgaged premises by the mortgagor to the mortgagee, by delivery of deed in escrow, to be delivered in case of the non-payment of the mortgage deed within a certain time, will be set aside where the property is of double the value of the indebtedness."

The plaintiff's evidence in this case discloses that the value of the property at the time the last deed was executed on May 28, 1901, was at least three or four times the value of the total indebtedness of the mortgagor.

And further in the same opinion it is stated: "In relation to such subsequent agreement, Jones, in his valuable work on Mortgages (Section 251) says: 'A subsequent agreement that what was originally a mortgage shall be regarded as an absolute conveyance is open to the same objection (that is, the objection to such agreement in the mortgage itself), and will not be sustained unless fairly made, and no undue advantage is taken by the creditor. The burden is therefore upon the creditor to show that the right of redemption was given up deliberately, and for an adequate consideration.' In support of this proposition, the author cites, among many other cases, Villa *v.* Rodriguez, 12 Wall. 323, from which we quote the following passage: 'The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que* trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes. He must exercise no undue influence. He must take no advantage of the fears and poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered, and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law.' "

The Supreme Court of California also quotes with approval the doctrine announced in Russell *v.* Southard, *supra.*

But it is contended by the plaintiff in error that the plaintiffs were guilty of laches. There is no merit to this contention. This suit was commenced in the district court on June 12, 1903, about two years after the execution of the last deed dated May 28, 1901. The note evidencing the indebtedness was dated October 24, 1898, and the mortgage and escrow deed securing the payment of the same were executed at the same time. The escrow deed of October 24, 1898, contains the following stipulation: "This deed is given to be held in escrow as additional security to grantee for loan of $1000 this day loaned to the grantors, and for which they have this day given the grantee a mortgage on the same land." In Russell *v.*
569 Southard, *supra,* this same question was raised, and the court in that case said: "This was filed after the lapse of nineteen years and eight months from the time the loan became payable. James Southard, the original mortgagee, had then been dead many years. More than sixteen years had elapsed since the defeasance was surrendered; and though we are satisfied Russell was under great embarrassments, and though we are of opinion he himself believed his right to redeem was probably extinguished by the terms of the defeasance, and its surrender, yet his neglect to look into and assert his rights, must not be allowed to subject the defendants to the risk of injustice." So we think that under the evidence and circumstances of this case, it would be unequitable and unjust for the court to hold that the plaintiff was guilty of such laches as would preclude her from maintaining this action.

What, then, is the status of the plaintiff in error and the defendant in error? The answer to this question we think is clear; it is that of borrower and lender, or debtor and creditor, mortgagor and mortgagee in possession. Equitable principles must control a full and complete settlement of the rights of the parties to this action. Wagg is entitled to be paid for the principal indebtedness, together with interest at the rate specified in the note and mortgage; for all taxes, assessments and other proper charges and expenses necessary for the management and protection of the estate, and he is responsible to Mrs. Herbert for rents and profits to be applied upon the indebtedness. And the rights of all subsequent purchasers in good faith for a valuable consideration, without notice of the rights of the defendants in error, should be fully protected according to recognized principles of equity. Romig *v.* Gillette, 187 U. S. 111; Gillette *v.* Romig, *et al.*, 17 Okla., 324.

But it is contended by the plaintiff in error that Mrs. Herbert is estopped from claiming or setting up an interest in the property adverse to Wagg. The doctrine of estoppel has no application to this case, under the well settled doctrine that a party cannot take advantage of his own wrong. In Vol. 2, sec. 917, of Pomeroy's Equity Jurisprudence, it is said: "*Promptness, Delay through Ignorance of the Fraud.*—The most important practical consequence of the two principles above mentioned is the requisite of promptness. The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of fraud. After he has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence, and this may be, and generally will be, a bar to any equitable remedy. To this rule there is one limitation; it applies only when the fraud is known or ought to have been known. No lapse of time, no delay in bringing a suit, however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time." And in section 918 of the same work, it is said: "*Persons against whom Relief is Granted.*—The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. 'A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud.'"

570 In discussing the question of acquiescence and lapse of time, Mr. Pomeroy, in section 965, lays down the following doctrine: "A second mode by which the remedial right may be destroyed, and the transaction rendered unimpeachable, is acquiescence. The term 'acquiescence' is sometimes used improperly. It differs from confirmation on the one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be

oidable, but recognizing the transaction as existing and intended, in ome extent at least, to carry it into effect, and to obtain or claim he benefits resulting from it. The theory of the doctrine is, that a arty, having thus recognized a contract as existing, and having one something to carry it into effect and to obtain or claim its enefits, although perhaps only to a partial extent, and having thus aken his chances, cannot afterwards be suffered to repudiate the ransaction and allege its voidable nature. It follows that *mere* elay, mere suffering time to elapse without doing anything is not equies-ence, although it may, and often is, strong evidence of an equies-ence; and it may be, and often is, a distinct ground for re-using equitable relief, either affirmative or defensive. An acquies-ence is thus a recognition of and consent to the contract or other ransaction as existing, the requisites to its being effective as a bar are, nowledge or notice of the transaction itself, knowledge of the party's wn rights, absence of all undue influence or restraint, and conse-uent freedom of action; a conscious intention to ratify the trans-ction, however, is not an essential element. When a party with ull knowledge, or at least with sufficient notice or means of knowl-dge, of his rights, and of all the material facts, freely does what mounts to a recognition of the transaction as existing, or acts in a nanner inconsistent with its repudiation, or lies by for a consider-ble time and knowingly permits the other party to deal with the ubject-matter under the belief that the transaction has been recog-ized, or freely abstains for a considerable length of time from im-eaching it, so that the other party is thereby reasonably induced o suppose that it is recognized, there is acquies-ence, and the trans-ction, although originally impeachable, becomes unimpeachable in quity."

It will thus be seen that the question of laches, acquies-ence, and stoppel are dependent upon its own circumstances, and whether hey must exist, we must determine that question from all the facts nd circumstances involved in the controversy; and again, upon this ssue the court having found in favor of the plaintiffs and against he defendant, and such finding being sustained by sufficient evi-lence and in harmony with the settled doctrines of equity juris-rudence, such findings of fact are conclusive upon this court.

Now do we think there was any error in admitting or excluding ny material or competent testimony in the course of the trial. If t was error to admit the memorandum on page 58 of the record, it vas clearly harmless and could not have affected the result of this ase, and it is to be presumed that the court sitting as a chancellor, nly considered material, competent and relevant testimony in mak-ng up its findings and rendering the decree in this case. Nor was here any error in rendering the decree in the case.

It follows that the court, upon the evidence and laws of this case, ightfully found the issues in favor of the plaintiffs and against the lefendant, and decreeing that the deed executed on May 28, 1901, vas a mortgage. The judgment of the district court of Pawnee ounty is affirmed.

All the Justices concur, except Burford, C. J., who tried the cause below, not sitting, and Pancoast and Garber, JJ. absent.

United States of America,
*Territory of Oklahoma, ss.*

In The Supreme Court.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the opinion in the cause of S. R. Wagg Pt'ff in Error *versus* Mary B. Herbert, *et al* Def'ts in Error which opinion was rendered by said Supreme Court at the June, 1907, Term, on the 12th day of October, 1907.

In Witness Whereof, I hereunto set my hand and affix the seal of said Supreme Court, at Guthrie, this 19 day of Oct. 1907.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
*Clerk Supreme Court,*
By JESSIE PARDOE, *Deputy.*

571 In the Supreme Court of Oklahoma Territory.

In Equity. No. 1946.

Solomon R. Wagg, otherwise known as S. R. Wagg, Plaintiff in Error,

*vs.*

Mary B. Herbert, Leroy M. Drown, John P. Rookstool, William A. Rookstool, Edna D. Rookstool, Gertrude M. Martin, The Christian Church, Effie S. Griffin, Dickerson, Goodman, Smiley Lumber Company, David B. Holler, Samuel R. Hull, M. E. Hull, E. R. Lane, Thomas H. Williams, Thomas B. Andrean, John B. Meyers, C. I. Green, H. C. Berwick, First National Bank of Cleveland (a Corporation), Effie P. Gilbert, Jas. W. Eaglin, V. May Eaglin, Grace Haunerkampf, J. T. Kiggins, George Lee, William R. Howell, R. L. Burt, Chas. E. Funk, Joe S. Rogers, S. R. Keeling, Annie Berwick, Kate Wyrick, The Triangle Bank (a Corporation), Dora A. Duncan, George Farabee, John Segan, William Smithson, Joseph Alderson, J. J. Alderson, Thomas Clawson, J. S. Sewell, S. R. Donges, Frank Porter, Noah A. Miller, A. R. Andrean, and Irene Lanning, Defendants in Error.

*Request for Additional Findings.*

Comes now the plaintiff in error Solomon R. Wagg, by Biddison, Campbell & Eagleton his attorneys, and requests the Court to make a statement of the facts of this case such as is required of this court by the provisions of Section 2 of the Act of April 7th, 1874, C. 80, 18 Stats. 27, which provides as follows:

"On appeal from the Territorial Courts to the Supreme Court instead of the evidence at large a statement of the facts of the case in the nature of a special verdict, and also the rulings of the Court on the admission or rejection of evidence when excepted to, shall be made and certified by the Court below and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree."

Your petitioner represents to the Court that he has perfected an appeal to the United States Supreme Court from the judgment of the Court herein and that the statement of facts being a mere 572 recitative of the pleadings of the parties is insufficient to enable this plaintiff in error to obtain proper review of the substantial errors complained of to this court and relied upon in the assignment of errors for reversal in the United States Supreme Court.

No findings of fact upon the allegations of the second defense in defendant's answer stated is made by this Court, although the allegations thereof are proven by undisputed evidence. Therefore this plaintiff in error asks this court particularly to make findings as to the allegations of fact in said second defense stated, and particularly as to the following allegations therein:

First: Was the plaintiff below six months in default of the payment of taxes at the time Wagg took the escrow deed from the Bank? The undisputed evidence is that she was, as shown by the testimony on pages 467 *et seq.* Also pages 432 and 320.

Second: Did plaintiff reside upon the mortgaged premises at all times prior to the bringing of this action as alleged in plaintiff's petition, and did she have actual knowledge of the platting and improvement of said land in controversy and the selling thereof to innocent purchasers? See pages 341 and 213 of case made. In the latter page Mrs. Herbert testified as to knowing that some parties had moved upon the tract.

Third: When was the tract platted for townsite purposes and the selling of lots commenced? On page 237 of the case made the surveyor testifies that the property was platted in July and August of 1901, and on page 340 Mr. Drown testifies that he was continually selling lots thereafter.

Fourth: Did Mr. Wagg advise Mrs. Herbert that she might redeem the property up until she had made the agreement with him to sell him a portion of the premises? On page 93 of the record plaintiff below introduced a letter from Wagg telling her to 573 go ahead and find a purchaser but reserving some interest which by the letter found on the next page of the case he abandoned, and on page 95 Wagg's letter of December 24, 1900, to Mrs. Herbert extends the time for her to find a buyer till March, although she only asks until January, 1901. See also testimony page 321. These letters were all introduced by plaintiff herself.

Fifth: Did Mrs. Herbert on the 6th day of July, 1901, and after the execution of the settlement deed make the affidavit and contract, copy of which is attached to defendant's answer, and which execution is properly alleged and not denied under oath and which instrument is introduced in evidence by plaintiff at page 112 of the record, the circumstances of the execution of which instrument are detailed on page 36 of the record?

Sixth: Did Wagg continue to pay the taxes on the property as shown by the treasurer's record as on page 69 of the case made?

Seventh: Did Mrs. Herbert convey fifteen (15) acres of the twenty-five (25) acres conveyed to her at the time of the final settlement to Swan, as she testified at page 194 of the record, in the year 1902?

Eighth: Had there been subsequent to the execution of the settlement deed and up to the time of the bringing of this suit a considerable rise in values of property in and about Cleveland?

Ninth: Had there been an increase of railroad facilities and of population? These propositions are answered on pages 281 and 300 of the case made.

574 Tenth: In the opinion of the Court it was stated that plaintiff in error Wagg took possession of the lands in controversy but the time of such taking possession is not stated, and we ask that that time be found and stated by the Court for the reason that it appears from the opinion that he might have taken such possession prior to the execution of the settlement deed when there is no evidence to support such finding and the same is not the fact and the evidence shows the contrary. Mrs. Herbert testifies at page 230 of the case made that at the time of the execution of the settlement deed there was only two houses upon the land, one of which she occupied and the other was rented by Judge Eagleton under an adverse claim of title which Wagg had nothing to do with. Mrs. Herbert also testifies, page 144 to 179 of the record, that Wagg asked her for the hay to apply upon the unpaid taxes and defaulted interest and that she made no objection Drown testifies on page 349 of the record that he never took possession of the property or collected any rents, although he had been instructed so to do by Wagg, and there is not a line of testimony in the entire record that Wagg ever took possession of any of this land until after the execution of the settlement deed.

Eleventh: Did Mrs. Herbert know the value of the land and did she believe she was getting the worst of the bargain at the time of the execution of the settlement deed with Wagg? Mrs. Herbert answeres this question in the affirmative at page 216 of the record.

575 Twelfth: What if any specific acts of oppression, fraud or undue influence was plaintiff in error guilty of other than those specifically stated in plaintiff's petition? On this proposition we submit there is no evidence of any of it.

Thirteenth: What were the specific acts of fraud, oppression or undue influence which the Court finds plaintiff in error guilty of?

BIDDISON, CAMPBELL & EAGLETON,
*Attorneys for Solomon R. Wagg.*

Endorsed: No. 1946—Solomon R. Wagg, Plaintiff in error, *vs.* Mary B. Herbert *et al.*, Defendants in error—In the Supreme Court sitting at Guthrie, Okla.—Request for Additional Findings—Filed Nov. 8, 1907, Benj. F. Hegler, Clerk Supreme Court—Biddison, Campbell & Eagleton, Tulsa, Oklahoma, attorneys for S. R. Wagg.

576 And thereafter, at the June, Term, 1907, on the fourteenth day or November,1907, the following proceeding was had in said cause, to wit:

#1946,

S. R. WAGG, Plaintiff in Error,
*vs.*
MARY B. HERBERT ET AL., Defendants in error.

It is ordered by the Court that the petition for special findings of fact herein be and the same is hereby overruled.

577 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA,
*Territory of Oklahoma, ss:*

*Certificate.*

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 576 pages numbered from 1 to 576 inclusive, are a full true and complete transcript of the record and all proceedings in said Supreme Court in the case of S. R. Wagg, Plaintiff in error, *vs.* Mary B. Herbert *et al.*, Defendants in error, as the same remain upon the files and records of said Supreme Court.

In witness whereof I hereunto subscribe my name and affix the seal of said Supreme Court at the City of Guthrie, this 15th day of November, 1907.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
*Clerk Supreme Court of the Territory of Oklahoma,*
By JESSIE PARDOE, *Deputy.*

Endorsed on cover. File No. 20,916. Oklahoma Territory supreme court. Term No. 212. Solomon R. Wagg, appellant, *vs.* Mary B. Herbert, Leroy M. Drown, John P. Rookstool *et al.* Filed December 2d, 1907. File No. 20,916.

Office S[illegible] U. S.
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OCT 25 1909
JAMES H. McKENNEY,
Clerk.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1908.

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SOLOMON R. WAGG,
*Appellant,*

vs.

MARY B. HERBERT, LEROY M. BROWN, JOHN P. ROOKSTOOL, ET AL.,
*Appellees.*

No. 29.

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## BRIEF FOR APPELLANT.

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**Arthur J. Biddison,**
*Attorney for Appellant.*

IN THE

# Supreme Court of the United States.

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SOLOMON R. WAGG,
*Appellant,*
vs.
MARY B. HERBERT, ET AL.,
*Appellees.*

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## STATEMENT OF THE CASE.

In stating this case we shall separate the statement into two parts; in the first portion outlining the admitted and uncontroverted facts, and the history of the transactions between the parties, which form the skeleton, both of the plaintiff's cause of action and the defendant's defense, but not including therein the gist of either.

The second portion of the statement will include only the presentation of evidence or points in controversy concerning which there is difference, either as to the facts the evidence proves, or concerning the law applicable to the evidence. In this portion of the statement we will give the evidence itself, and simply the contentions of the parties, reserving to the brief and argument our discussion of the proper conclusions of law and fact to be drawn from this evidence, some of which is disputed, although but very little.

This division of the statement into the admitted facts, and the evidence upon controverted questions, is resorted to because the gist of plaintiff's complaint and the cause of action is the fraudulent and oppressive manner in which she alleges the main occurrences were brought about, and it is this fraud, oppression and undue influence alleged to be connected with the principal transactions, concerning which there is controversy of law or of fact.

## THE UNCONTROVERTED FACTS.

Pursuant to extended negotiations between Mary B. Herbert and her husband, W. H. Herbert, on the one hand, and this plaintiff in error on the other hand, and aided by Mr. A. A. Drown and his son L. M. Drown, friends of both parties, the plaintiff in error, in the fall of 1898, loaned to the said Herbert the sum of $1,000, reserving the first year's interest at the rate of 10 per cent per annum. As evidencing this indebtedness, the said Herbert and wife executed their promissory note, dated October 24th, 1898, payable five years after date, interest payable annually in advance. They also secured said note by their mortgage upon the west one-half (w.½) of the southeast quarter (s. e ¼) of section eight (8) in township twenty-one (21) north of range eight (8) east of the Indian Meridian, being property then owned by the said Mary B. Herbert, and occupied by herself and husband as a home, and the title of which was in the said Mary B. Herbert.

At the time of the execution of the said mortgage, and as further security therefor, and pursuant to previous negotiations, which will be hereafter commented upon, the said Herbert and wife executed their certain warranty deed to the said premises, leaving the same with the Bank of Cleveland in escrow, to be delivered to Wagg upon breach of the conditions of the said mortgage. In said mortgage Herbert and wife covenanted that the premises were free of all incumbrances, and the conditions of the said mortgage were for the payment of the said note and the interest thereon annually in advance, and all taxes and keeping the buildings insured, and upon violation of any of these conditions the mortgage was subject to foreclosure.

After said loan was closed the mortgagors never paid any taxes or any interest, *and there was at the time of the execution of the said mortgage taxes assessed against said property*, and the said property was advertised for sale for said taxes one year later, that is in the fall of 1899, and Wagg, learning of the fact that the property was to be sold for taxes, paid the same, and the year's interest having accrued and not being paid, Wagg procured the deed from the bank having the same in escrow and caused it to be put of record on December 26th, 1899, but still insisting that the Herberts should pay him his interest and the taxes and keep up their loan according to the contract. This, however, they were unable or refused to do. Nothing further transpired between the parties until in May, 1900, more than six months after the default in the taxes and interest, at which time Mr. Wagg went to Cleveland and sought to make some arrangements to procure his interest and taxes, and while there called upon Mrs. Herbert; Mr. Herbert in the meantime having absconded. During this visit Mr. Wagg proposed that Mrs. Herbert permit him to put up the hay on the place and apply the proceeds upon the debt, and to this she agreed, and he did, later in the season, have the hay put up and the proceeds applied on the said mortgage debt.

July 12th, 1900, Mrs. Herbert wrote Mr. Wagg, asking for a settlement and proposing a division of the property and offering one-half of the land. This commenced the negotiations between the parties with reference to Wagg taking a part of the land in satisfaction of his debt. These negotiations continued until early in 1901, when an agreement was reached between the parties that Mrs. Herbert should convey the land to Wagg, in consideration of the mortgage debt, and that he should reconvey to Mrs. Herbert the south twenty-five (s. 25) acres, leaving himself only

55 acres of the tract. Pursuant to this agreement and after one or two sets of instruments for that purpose had been prepared by Wagg and sent to Mrs. Herbert for her signature, a satisfactory one was finally prepared, dated March 20th, 1901, but not executed by her until May 28th, 1901, and by which she conveyed the entire 80 acres to Wagg, who, with his wife, executed a conveyance of the south 25 acres to Mrs. Herbert in return. Wagg's deed to Mrs. Herbert being dated and executed the same day her deed to him bears date, but was not delivered until the same time her deed was delivered to him and as a settlement of the transaction. Wagg at the time cancelled the note and mortgage, and the transaction was closed, Mrs. Herbert at the time making an affidavit that she believed her husband to be dead, and that she had not heard from him for a long time, as the reason why her husband did not join her in the deed.

During all this time Herbert and wife paid no interest or taxes and Wagg had paid the taxes upon the property, and thereafter continued to pay the taxes upon the portion of the property retained by him, and the Herberts never having at any time offered to pay the same.

About the time of this settlement, and after the parties had agreed upon the terms thereof, Mrs. Herbert being very much pleased with the terms she had arranged with Mr. Wagg, in his not foreclosing but giving her a portion of the property clear of incumbrance, wrote Mr. Wagg a letter in which she thanked him for his consideration, and subsequently, on July 6th, 1901, more than six months after the signing of the deeds, and more than three months after the terms of the settlement had been agreed upon, some question having arisen as to the sufficiency of Wagg's title on account of the absence of Mr. Herbert's signature from his deed, and to enable Wagg to sell the property, Mrs. Herbert made an affidavit, a copy of which is found on page 69 of the printed transcript, wherein she said that she had not heard from her husband since November, 1901, and that she believed him to be dead, but agreed that in the event Herbert should ever return she would procure his signature to the deed. This Mrs. Herbert desired to be retained and not put upon record, as it would cause unnecessary comment, but in the affidavit stipulating that the same should be used in the event it should become necessary to perfect Wagg's title.

During all this time Mrs. Herbert and her family had resided upon the premises and continued after the conveyance to her of the south 25 acres to reside thereon, and ever since has resided thereon, except that she sold 15 acres of said land by deed of general warranty, after she had procured the deed from Wagg, whereby it was released from the operation of the said mortgage, and she was thus enabled to give clear title.

In the fall of 1901, plaintiff in error laid out the 55 acres of land retained by him as an addition to the town of Cleveland, and caused the same to be surveyed and platted and lots therein sold to the parties who were made co-defendants with this plaintiff in error in the original action, and are here made defendants in error solely for the purpose of saving any question as to want of necessary parties upon these appellate proceedings. Plaintiff in error continued to deal with the said 55 acres of land as his own and sold portions thereof up until June 13th, 1903, at which time Mr. Herbert, having returned home a few days prior thereto, joined with his wife in this action, by filing their petition, which commences upon page 43 of the printed transcript, and which, after divers amendments, appears as the second amended petition, commencing upon page 51 of the transcript. It will thus be seen that from the time of the giving of the said note and mortgage until the time when Wagg took the "escrow deed" out of escrow was more than one year, and that it was more than eighteen months until Wagg had his conversation with Mrs. Herbert with reference to applying the proceeds of the hay upon the accrued interest, and nearly two years before said hay was harvested and so applied, and nearly two years and a half before the settlement was made between the parties culminating in the "settlement deed" to Wagg and his conveyance of a portion of the premises to Mrs. Herbert, and more than four years and a half until this suit was brought, the same not being brought until more than two years after the "settlement deed," during all of which time Mrs. Herbert resided upon the said 25 acres of land, made no claims to the 55 acres of land, after having conveyed to Wagg, saw lasting and valuable improvements made upon said premises, saw portions thereof dedicated as public highways, permitted Wagg to convey the said property as his own, and even gave affidavit and written assurances of title to Wagg to enable him to do so, and never raised a voice of protest until after a railroad was built into the town, and another railroad built into the vicinity thereof, when, suddenly realizing that sufficient money could be borrowed upon the tract of land to pay the old debt and leave her a handsome profit, she brings this action.

So much are the undisputed, unquestioned facts as shown by the pleadings and uncontradicted testimony and they are all facts concerning which there has been and will be no dispute in this case.

## THE CONTROVERSY.

Taking the outline history of the transaction as a basis, we will now state the matters concerning which there is question raised, either of fact or law, and that are the gist of plaintiff's complaint.

In plaintiff's second amended petition, upon which this action was finally tried, the plaintiff contends that the "escrow deed," that is the deed executed by Herbert and wife at the time of the execution of the mortgage, was placed in escrow, subject only to the terms of the letter from Wagg to W. H Herbert, dated September 25th, 1898, attached to plaintiff's said second amended petition and marked "Exhibit D," in which Wagg says:

> "In case you fail to fulfill the terms and are in default of interest or other terms for six months; then the deed is to be delivered to me, or my order. The mortgage is for $1,000.00. I will deduct the first year's interest, send $900.00 to the bank with instructions. This pays first year's interest; second year's interest is not due until the end of the second year, and six months grace on the end of this makes the full 2½ years before you allow or I can ask for the deed in case default contract."

This letter begins on page 59 of the transcript.

Therefore plaintiff claims that when Wagg took the deed out of escrow and put the same of record, prior to the expiration of the two and one-half years from the date thereof, he was guilty of such violation of the terms of his agreement as constituted a fraud, and that by thereafter claiming that such deed constituted him the owner of the land, that he was guilty of undue influence and oppression to such an extent as to make void the final "settlement deed" given him by Mrs. Herbert. And by "settlement deed" is meant the deed of the entire eighty acres made by Mrs. Herbert in the settlement of the mortgage debt, and in consideration that Wagg should reconvey to her 25 acres of the land.

With reference to this matter, however, plaintiff in error contends that said letter to Herbert was only a part of the negotiations between the parties, and that it was not the ultimate contract, but that the ultimate contract is embodied in the note and mortgage themselves, showing when the interest is payable, and making the second year's interest payable in advance, and not at the end of the year as stated in said letter, and in support of this proposition Mr. Wagg testifies, and it is nowhere contradicted, that the terms of the escrow were changed, and that the deal was not closed until November 12, 1898, upon which date he wrote Herbert his letter, in which he says:

> "Mr. Drown states you consider that to give me a deed in escrow will in default of terms of contract operate as and be a sale of said land for the loan made.
>
> "Yes, your understanding is correct. If you fail in any of the terms under which the loan is made, the land is mine. Now we both understand and agree upon it. Awaiting your action, I am, Yours truly, S. R. Wagg"

(See pages 83 and 84 of transcript.)

As bearing out Wagg's statement, and that Herbert acquiesced therein, see Herbert's letter to Wagg of October 25, 1899, found on page 85 of the transcript, in which he says that he had been misled as to the time when the second interest was due by relying upon this old letter of Wagg's, and asking for two week's extension.

The next matter, after taking this "escrow deed" out of escrow and placing it of record, of which plaintiff below complained in her second amended petition, was that plaintiff in error claimed to be the owner of said property by virtue of said deed. And in that way used the same to oppress and unduly influence her in executing the "settlement deed." Upon this question it might be well to remark that it appears that both from this letter of Wagg's to Herbert, dated November 12, 1898, and also the letter to Herbert, dated September 25, 1898, and upon which plaintiff below relies, as constituting the terms of the contract, that it was the intention of the parties to make this "escrow deed" operate as a conveyance of the property in event there was a breach of the terms of the mortgage; the only difference being as to the time at which he would be entitled to take the "escrow deed" into possession. It therefore being the intent of the parties to have such a transaction, it would not have constituted any fraud for Wagg to have made such a claim, as it would be for a person to claim that a deed given as security was not intended as security, but was in fact a sale, and the transaction one of sale and not one of lending and borrowing. But we need not comment upon this proposition at this time.

The evidence upon the question of Mr. Wagg claiming the ownership of the property is as follows:

Mrs. Herbert being upon the witness stand testified (Page 130 of transcript):

"Mr. Clark:

Q. Now, Mrs. Herbert, referring to the time when the first interest became due, after the lapse of one year, referred to in this correspondence, I will ask you to state whether or not you remember the circumstance of Mr. Wagg coming to Cleveland, and coming to see you in reference to this matter? A. I do.

Q. Did he come down to your house to see you? A. He did.

Q. I will ask you to state just what occurred upon the visit of Mr. Wagg to Cleveland at that time, between yourself, Mr. Wagg and the Drowns? A. I don't know what time Mr. Wagg arrived in Cleveland, but they called at my house, he and Mr. L. M. Drown and Mr. R. J. Inge, as near as I can recollect, between the hours of 5 and 6 o'clock; it may possibly have been a little after 6; I don't know as to that.

Q. What conversations were had at that time with them concerning the land, concerning taking possession of the land, or the hay that was on the land; any conversation that was had at that time, relate it? A. Well, he asked me if I wanted to retain my home, and I said that I did, and referred to Mr. Herbert's illness as being the reason why we had not been able to meet the indebtedness; as I understood then, that *all he was claiming was the indebtedness,* and he said something in regard to his taxes and interest, and I said that referred to the same; and he claimed to own the land, and said that some one at Pawnee had asked him what he was going to do with his land down at Cleveland, and he said that he had placed the deed on record, and that it was now his land; that it was all conveyed to him and gave me to understand—

Mr. Wrightsman: Wait a minute. State what he said and not what you understand.

Mr. Clark: Give the substance, where you cannot remember the words.

A. That anything I would have to look to at all would be to look to him; that he owned it; he reiterated that he owned it, he constantly did, and his agent constantly did—

Mr. Wrightsman: Wait a minute. We want what he said, not your conclusions.

A. And his agent's family constantly did—

Mr. Wrightsman: Wait a minute.

The Court: Just confine your answers to the questions—

A. And on that ground—

The Court: Wait a minute. I say I want you to confine your answers to the questions that counsel ask you, and not go beyond that, and we will get along better.

Mr. Clark: Now, I want you to give me, if you have not already done so, the entire conversation had between you and those parties at your house that evening, and when you have finished that conversation, stop, and I will ask you another question.

A. Well, on that claim of ownership, *he asked me if he could have the hay,* and I not knowing, being entirely inexperienced in business matters, and having no one to consult, Mr. Herbert was away from home, just I and my two children, I raised no protest against taking the hay, and at the same time that was all I had to look to to get these taxes and interest."

And upon cross-examination (page 153) she testified:

"Q. I am not asking you anything about on his claim of ownership. If you will, kindly answer my questions? A. That was what he asked me, on his claim of ownership, if he could have the hay.

Q. Now, did he say, 'Upon my claim of ownership, can I have the hay, Mrs. Herbert?' Did he say that to you? A. No.

Q. What did he say to you, please? A. He claimed to own the land—

Q. I don't want what he claimed. Just use his language, if you can? A. That is just what I am trying to do.

Q. What did he say? A. He said, "I own this land; it is mine, conveyed to me;" that is the way I recall it, and *"are you willing that I should have this hay?"*

Q. He repeated all these legal conclusions, that he owned the land? A. He did previous to asking me.

Q. Well, did he in the same request whether or not he should have the hay, say to you that he was the owner of the land, and had title to it? A. That same visit, in that same statement. He was there only a few minutes. Virtually the same demand."

Wagg also wrote, on April 14, 1900, a letter to Herbert and wife, which is found on page 93 of the transcript, which is as follows:

"W. H. Herbert and Wife, Cleveland, Oklahoma. I expect to be in your city or town in the near future, and inasmuch as the loan of October, 1898, is in default of payment of interest, and the months allowed you as grace in which to make it good expires during the month of April, 1900, I ask that you make up all payments due to date, either to me, or place to my credit in the Bank of Pawnee, subject only to delivery of my receipt for same, otherwise the title to the Cleveland homestead will, by virtue of our agreement and papers of record, pass to my ownership and control. I hope that you will pay up past dues and notify me of action you take in the matter. I am yours truly, S. R. Wagg."

Wagg also wrote a letter to Mr. Herbert, dated April 30, 1900, which is as follows:

"W. H. Herbert, Wichita, Kansas. My Dear Sir:—Your letter of the 27th at hand. I was obliged by circumstances you made to put my deed on record, allowing the property to be offered at tax sale. I sent money to pay them.

"I do not propose to be hasty or unfair. *If you want to pay the interest up you can do so. I have not asked for any full payment of principal; the interest will do.* I do not intend to foreclose or turn you out of the house, and shall not unless you fail to do anything. I expect the hay crop will help pay the interest. I shall trust you for it. I shall expect to be in Cleveland, but do not go to the expense to see me. If you are there I shall be glad to see you. Yours truly, S. R. Wagg."

In Wagg's letter of instructions to Drown, dated June 5, 1900, Mr. Wagg uses this language:

"Cut the hay without delay, and to save any possible chance for them to get a clue on it, lease the privilege of piling it on the third party's land if you can, and find a party you can trust for it. * * * Herbert gets no more favors, the land is mine, and from now on will be treated as such. Cut the hay and get it off the land as quickly as you can. If a deed with two years' taxes paid is good, I have it."

This letter, however, was never used to oppress Mrs. Herbert, as she never knew of its existence until this case came to trial, and the letter was produced from Mr. Wagg's copybook.

Mr. Wagg also, on December 14, 1899, writes Mr. Eagleton a letter of instructions, asking him to assist him in the matter as follows:

"Wm. L. Eagleton, Atty., Pawnee, Oklahoma.

Dear Sir:—The Herberts have defaulted in interest and allowed lands to be advertised for taxes, and it has cost me in all about $6.00 extra to settle things up. This, to say the least, is poor taste, never to say a word to me about it. I fear he may be trying to bleed somebody else by putting a second mortgage after having placed a deed in escrow to secure a debt. * * * * Please be on guard, and notify the register of deeds not to receive anything for record against the lands from the Herberts, as they have already given a deed. I do not want to push him and shall not if you can protect my interest as indicated or some way. Yours very truly,

S. R. Wagg."

And after the conversation with Mrs. Herbert and Wagg's return home, he wrote to Mr. Eagleton a letter of instructions as follows:

"Appleton, Wis., May 17, 1900.

Wm. L. Eagleton, Pawnee, Okla.

My Dear Sir:—Your letter of April 30, I found on my return home. Out of defference for your request I will wait on W. H. Herbert as requested until October I called at the Wichita hotel he was said to stop at, but found him only an occasional caller. Consequently did not see him. In granting this request I do it with the express understanding that I am to have the hay crop to put against taxes, etc. I have just paid the second year's taxes. As a business man you know this is not pleasing to the lender to put up over $60.00 in taxes as a matter of agreement made before and put in effect simultaneously with the signing of the mortgage with the agreement on the deed and recording of same, the deed is now recorded. I have not asked anyone to take it off my hands, but to carry out the payment of interest and taxes as per contract. Yours very truly,

S. R. Wagg."

Mr. Wagg's account of this visit to Mrs. Herbert is found on page 423 of the record and is as follows:

"She said that she had consulted, or conferred with a gentleman in Pawnee, in whom she had confidence, or words to that effect, and that he had told her that a deed in escrow did not convey the proper title of a deed, and Mr.—

Mr. Wrightsman:

Q. What did you say to her? A. I remarked to her that I didn't think a man that would give that kind of advice, knowing how the deed came into my possession, with the clear understanding that was made before I made the loan or took the deed, and the letters which I had written, and which are in my copybook, specifically stating that the land was to be mine in case of the lapse of the contract. I didn't think that the man that gave advice of that kind was a friend of hers; that was my opinion."

Mr. Wagg's letter and communication to Mrs. Herbert, all during the 18 months, after he had put the deed upon record, and before they made the final agreement to divide the land, shows that he continually informed her that he did not intend to take any advantage of the fact that he had the deed to the land further than to make it additional security for his claim. The letter of July 18th, 1900, to Mrs. Herbert, found on page 87 of the Case-made, illustrates this and reads as follows:

"Your favor of the 12th is before me. In reply will say that I do not incline to a division of the land; but under the condition I will deed back to you the land for $1,300.00 October or November next as you can arrange. The back interest, taxes, expense incurred and holding the principal five months before loan was closed amounts in all to $1,280, and as the loan is for five years, it is a concession I would not make with a business man, and only do it to you as your situation merits some consideration, so I do this for immediate action and acceptance on your part—notify me of your intention in the matter.

Yours respectfully,
S. R. Wagg."

At the same time Wagg writes to L. M. Drown a letter with reference to the matter, which is also found on page 87 of the case-made.

That Wagg was willing Mrs. Herbert should either settle, carry out the loan or pay the same off, is shown by her letter of July 23 to Wagg, found on page 89 of the case-made, which reads as follows:

> "Yours of the 18th inst. to hand. I will if possible have the money for you by the time specified. I requested a division of the land in event I should not be prepared to liquidate the indebtedness in the fall. Mr. Herbert being from home, I could not consult him as to the advisability of the proposition I made you; he has been very sick, which delayed his business, so in my anxiety I thought of a division of the land as a certain way by which you can obtain your money, or its equivalent, and I retain my home. I am sure if you understood the situation fully you would favor a division. Hoping that you will give the subject further consideration, I am respectfully,
>
> (Mrs.) W. H. Herbert."

Mr. Wagg's response to this is found upon page 310 of the transcript, under date of August 11, 1900, and reads as follows:

> "Your favor of some weeks ago, asking for a reconsideration of my declining to divide the land came to hand and is noted. On payment of $1,300.00 October or November 1, 1900, I will quit-claim to you or your purchaser one-half the Herbert homestead deed, the remaining half, fartherest from or west of Cleveland to your two boys jointly, reserving to you a life interest in the same; provided you explain clearly and satisfactorily to me and by what means W. L. Eagleton obtained title to the house located on the said homestead and is now renting and claims the right of a property holder to do so and collect rents. If anything is done would like to close it up entirely. I never had thought of turning you out and do not

expect to ever do such a thing. Awaiting your further communication, I am, Yours truly,
S. R. Wagg."

Again, on September 15, 1900, Mr. Wagg writes Mrs. Herbert a letter, which is found on page 101 of the transcript, and reads as follows:

"I am in receipt of a letter from L. M. Drown, regarding an answer to your last letter replying to mine of August 11th. I did not think an answer necessary. However, you can go ahead and find a purchaser at $1,300.00 for the east half (half) and I will deed the other half jointly to your two boys, giving you the first right to the income from the same in form of a life interest. This places it beyond the power of any one to scheme you out of it. I make this offer solely in the interest of yourself and boys. I reserve the right to one acre on the east side near Mr. Drown's store for warehouse purposes, same to be located when deed is made. I hope that I may be able to realize your wishes in securing a home for yourself and boys. If you cannot make this sale I will devise another plan later. Yours respectfully.
S. R. Wagg."

And this is supplemented by his letter of September 29th, 1900, in which Mr. Wagg withdraws the condition of his former letter reserving a part of the land for himself. This letter is found on page 101 of the transcript, and reads as follows:

"In selling the east half of the 80, you need not make any allowance for an acre on the east side, mentioned in my last letter. Sell it whole, straight lines.
Respectfully yours, S. R. Wagg."

Mrs. Herbert's letter to Mr. Wagg, found on page 99 of the transcript, is the one in which she thanks him for his consent to the division of the land, and that part of it reads as follows:

"Your letter of the 11th inst. has been received. I thank you for your consent to a division of the land. The way you propose to deed it is an advantage in some respects and a disadvantage in others from my point of view. I have not yet decided which outweighs the other. However, we can speak of this later, if desired. I was hoping that you would not only agree to a division, but that you would decide to retain the forty acres, because if you would hold it for a year or two I could redeem it with interest on the investment; in other words, buy it back from you if you wished to sell it; whereas, if it is sold to another party, I would possibly not have an opportunity to redeem it."

Wagg also writes Mrs. Herbert on December 24th, 1900, found on page 102 of the transcript, which reads as follows:

"Referring to your last communication, wherein you wanted time to sell extended to January, 1901. I hope you have been able to find a buyer. However, you can have until March 1st next if you need such time.

"If you should feel like making a division of the land as a final settlement of the matter and passing deeds, although I hold a deed of it all and under our agreement it is all conveyed to me, yet I shall not use any rights I may have harshly, but shall deed to you and your boys a piece of the land, preferably on which the house is located, so you may still live there and have land to cultivate for your support. You talk it over with Mr. L. M. Drown and have him write me. I remain, yours respectfully, S. R. Wagg."

We submit, therefore, upon the question of fact, that there is no construction that can be placed upon Wagg's conversation with Mrs. Herbert nor upon the letters that he wrote, either to Mrs. Herbert, Mr. Eagleton or to Mr. Drown, that shows that he was trying to force her to give up any or all of this land, but, on the contrary, that he desired simply his money and the interest that it earned, and that in the absence of their carrying on the contract, paying the interest as due, and the final loan when it should become due, he simply asked that he be paid his money with interest, taxes, costs and the expenses that he had been put to in negotiating the loan, and protecting it, including interest on the money for five months he had held it awaiting their acceptance.

But it is contended by plaintiff below, that Wagg ultimately refused to make any settlement and refused to permit her to sell to any purchaser which she might secure. And in support of this proposition, they submitted Wagg's letter to Mrs. Herbert of March 18th, 1901, on bottom of page 105 of transcript, which reads as follows:

"Your letter of March 5th came duly to hand. The option extended to you expired March first. On March 4th, I sold a part to Leroy M. Drown, and it is our intention to deed you the house and a liberal piece of the land in the early future.

"I think I can safely say Mr. Drown will accord you every courtesy and the most generous treatment, in which I shall concur.

Yours very truly, S. R. Wagg."

We submit in response to this, that it is exactly following out his proposition, wherein he had given her until March the first to find a buyer and settle with him at a certain price, and in the meantime she had elected not to find a buyer, but to have a division of the land, and had agreed with him upon the basis of division as a means of settlement, and he now by this letter reminds her of the fact, and that pursuant to her agreement as to the division, he had arranged with Mr. Drown to take half of the deal.

This was in no sense oppression, but simply insisting upon her carrying out the agreement which she had made and which she had elected herself, having abandoned the idea of finding a buyer, and requested the division, to which he, Mr. Wagg, had agreed after some objection. That she had made faithful effort to sell the land, but had been unable to do so, is shown by her testimony, and also by the testimony of Mr. Bridwell, the editor of the newspaper in which Mrs. Herbert had carried the following advertisement, found on page 306 of the transcript:

"For sale. 40 acres of land adjoining Cleveland on the west, part of what is known as the Herbert Homestead. Apply to Mrs. W. H. Herbert."

This advertisement she had carried during the summer and fall of 1900, and until Wagg's agreement to accept a part of the land. Having made other arrangements on the basis of a division of the land at her request, it was no oppression and no fraud for Mr. Wagg to insist upon her carrying out her suggestions It is true that Mr. Drown says in his testimony, that he had not at that time closed the deal with Mr. Wagg for the half interest, but it is equally in evidence that while no contracts were drawn between Mr. Wagg and Mr. Drown with reference to Drown taking a half interest in this land, that Wagg had promised to make that sort of a deal with him early in 1901, and Wagg's letter to Drown to that effect is found on page 102 of the transcript, and reads as follows:

"You can have half of the Herbert land, after settlement with Mrs. H. Yours truly, S. R. Wagg."

Mr. Wagg's explanation of that letter is found on page 331 of the transcript, and is undisputed.

"Q. Now you were telling her that you had sold this land to Leroy M. Drown on March 4th. Why did you do that, if you in fact had not done it? A Do you want me to explain?

Q. I want you to explain why you wrote to her that you had made this sale, if you in fact had not made it. What purpose had you in doing it? A. I will explain that. As the letter will show back in the autumn previous, Mrs. Herbert had expressed a desire to have a division of the land, and we didn't come to an agreement, but we did arrive at an agreement, where we agreed to give her 25 acres, and I had these deeds prepared and made up, and they were ready to send to her on the 21st of March, I think it was. Now, while these deeds were being made up, as agreed with her, and arranged with her, she had still continued negotiations with Mr. Deem and Mr. Sloan, and I don't know how many others, and this letter, I think, was one she wrote in saying she had made a deal with those parties, while at the same time she had made a deal with me, and I had prepared the papers and they were ready to go the 21st.

Q. Well, but this letter from her advising you that she was ready to pay that loan was received by you on March 5th? A. But she had already agreed to take these papers, as I had made them up, and she did take them.

Q. You hadn't the papers made up at that time, had you, on the 5th of March? A. Well, I couldn't say about that, I am sure. The option she had—the arrangement she had to sell to outside parties, expired on the first day of March, and if she did not sell to outside parties, we were to carry out this deal.

Q. Now you hadn't agreed at that time to give her 25 acres, had you? A. Yes, I had, because I had made the deeds that way. So there must have been an understanding of that kind.

Q. Your deed was not signed until the 21st of March, was it? A. It was mailed the 21st, and usually it takes a few days to get things up at best.

Q. You say to this court Mrs. Herbert had agreed with you, or Mr. Drown acting for you, at the time she wrote this letter stating that she had raised this money, and which is dated as you say, on the 4th day of March, do you say that woman had agreed at that time to take 25 acres and quit? A. She had agreed to take 25 acres and quit."

Mr. Drown also makes an explanation of the same matter.

Mr. Drown's account of the visit to Mrs. Herbert at the time she complains that she was oppressively induced to permit them to take the hay is found on pages 243 and 244 of the transcript.

The matters quoted cover the evidence with reference to any oppression or undue influence or improper use of the escrow deed. But counsel for plaintiff below further claim in their petition, that plaintiff in error, in the summer of 1900, and after the aforesaid conversation with Mrs. Herbert, took possession of a portion of the land. This is really too frivolous for comment; the evidence is undisputed that Mrs Herbert lived upon the land all the time, and all that Wagg or his agents did towards taking possession of the land was to go thereon pursuant to her permission and harvest this hay crop. Some letters were introduced, wherein Mr. Wagg instructed Mr. Drown not to let any lot-jumpers into possession of the property, and to notify parties on a portion of the land under Mrs. Herbert, that he, Wagg, was entitled to the possession of the property. But there is no evidence that Drown ever did anything under these letters of instructions, and Drown himself positively testifies that he did not. Mr. Drown's testimony upon this point is uncontradicted and is found on page 261 of the transcript, and reads as follows:

"A. Yes, I was doing what I could to accommodate Mr. Wagg and get the matter settled up.

Mr. Clark: Q. To comply with his request. Do you remember the circumstance of receiving the letter bearing date February 17th, 1900, to you, in which he instructs you, 'You are hereby authorized to act as my agent in looking after my lands and tenants on the Herbert property at Cleveland. Collect rents monthly. Sell the hay crop standing, if possible, and report to me once in three months, and keep me advised of any changes of interest from time to time.' Do you remember getting that letter? A. I believe I do.

Q. Do you remember trying to execute it according to instructions? A. No. sir; I never collected any rent.

Q. What about the hay? A. I didn't sell it standing.

Q. Didn't you try to carry out the instructions, telling you to sell the hay if possible standing? A. No, sir.

Q. Paid no attention to that? A. No, sir.

Q. That letter bears date of February 17th? A. Yes, sir.

Q. It was quite a time before the actual time for selling it, wasn't it? A. Yes, sir; Mr. Wagg was down, after that, personally."

It may therefore be absolutely assured, that there is no evidence to support the allegation in the petition, that the plaintiff in error took possession of the premises, prior to the time of the execution of the final settlement deed to him.

Plaintiff below further complains that her "settlement deed" to Wagg was obtained for a grossly inadequate consideration. The evidence upon this point is that the deed was given in consideration of the release of the mortgage, and the cancellation of the mortgage debt, and the reconveyance of 25 acres out of the 80 acres to Mrs. Herbert, leaving Wagg, in consideration of his debt, accrued interest, taxes, costs and expenses which he had a right to charge in consideration of the cancellation of his mortgage debt before its maturity, it having five years to run from its date, 55 acres. This is undisputed.

By her petition, plaintiff below alleges that this 55 acres was worth $100.00 per acre or $5,500 while the mortgage debt and interest accrued at the time of the final settlement was only $1,160.00, but as stated by Mr. Wagg, he had held the money in the bank of Cleveland for more than five months awaiting the acceptance of the original papers. He had taken two trips to Pawnee county from Wisconsin to look after this property. He had paid in taxes $123.95 and he was cancelling his right to hold his loan until its maturity, and have the benefit of his investment, at the rate of interest provided in.the contract, which in this country and at that time was far from excessive.

To support their allegations that the land was worth $100.00 per acre, the plaintiff below introduced the testimony of Mrs. Herbert herself, and she testified that the land was worth $100.00 per acre. They also introduced the testimony of W. T. Litten, who resides at Blackburn, 15 miles from Cleveland. Mr. Litten testified on page 124 of the transcript that the land was worth $100.00 per acre. Mr. Litten could not recall when the railroad "boom" came to Cleveland, but thought that it was in the spring of 1901, when the other testimony shows conclusively that it was not until much later, and that there was not at that time any increase in the values by reason of railroad talk. Mr. Litten also testifies at page 128 of the transcript, that at the time the mortgage was made, the land was of the reasonable value of $40.00 or $50.00 per acre. Yet upon cross examination Mr. Litten admitted the genuineness of his letter dated July 8th, 1898, and which was written Wagg, pending the negotiations for the mortgage, in which he says that the land at that time was worth $25.00 per acre, and that if a railroad should come it would be worth from $50.00 to $75.00 per acre. This letter is found on page 127 of the transcript.

It may be incidentally noted, that in this same letter Mr. Litten expresses the opinion that Mr. Wagg would not be able to get his money back, if he loaned it on the land, and that he would ultimately have to take the land. Mr. Litten also testifies that he knew nothing about the sales of land in that vicinity, and that the tracts of land adjoining on all sides of Cleveland which were sold about that time, were sold at prices of which he had no knowledge. Upon further cross examination, Mr. Litten admitted, that upon a former trial of this case, he had fixed the value of this land at the time of the final settlement between the parties as follows:

> "Q. Mr. Clark: I would ask you what would be a fair value of that land about May 20, 1901, for all purposes?
>
> Answer by Mr. Litten: Well, it could not be worth over $50.00 and I rather think $40.00 would have been a fair price for it."

This cross examination of the witness appears on page 282 of the transcript.

Mr. Simeon Mott was also called on behalf of the plaintiff below, to show the value of this property. Mr. Mott had formerly lived in Pawnee, 23 miles from the land in controversy, and since that time has lived in Keystone, almost an equal distance, on the other side of Cleveland. Mr. Mott testified that the only judgment he had as to the value of the land was the price put upon the lots by Mr. Wagg after he had platted it (see page 192 of the transcript), and he places the value of the land on page 193 of the transcript at $50.00 an acre.

Plaintiff below also introduces the testimony of John R. Skinner as to the value of this property. Mr. Skinner testifies that he lived at Blackburn, 15 miles from Cleveland, until sometime after the making of this settlement and that the closest he ever lived to Cleveland is 7 miles away, where he lives now. In the spring of 1901 were very dark days for Cleveland. That property was selling there for taxes, and there was a great deal of vacant property; that he would not be an expert on the value of this tract of land, but that he thought the property would be worth $50 per acre (see page 198 of the transcript).

Plaintiff below also introduces the testimony of John H. Crismon, as to the value of the land, who testified that he had lived since the opening of the country about 30 miles from Cleveland; that he did not know what lands were held at in the vicinity of Cleveland in the year 1901, and did not know what town properties were worth outside of Pawnee, but that he thought the property was worth $100.00 an acre, though he was not in that vicinity more than half a dozen times a year, and then upon official business. The witness testified (on page 206 of the transcript) that it is merely a guess proposition with him.

It will be seen from this testimony that four witnesses beside the plaintiff were used, none of whom lived at Cleveland or its vicinity, either at the time of testifying or at the time for which they fixed the value of the land. And not a single one of them in any proper sense qualified himself to give testimony upon the subject matter in controversy, while one of them admitted on cross examination, that upon a former trial of this cause, he had fixed the value of this land at $40.00 or $50.00 an acre, but now fixed the value at $100.00 and most of the witnesses fixed the value at $50.00.

To contradict this testimony on the part of plaintiff in error there was introduced the testimony of John W. Ortner, mayor of the town, who had resided there ever since the opening of the country, who testified that he was familiar with the transactions in real estate in that vicinity in the spring of 1901, and that the land was worth from $15.00 to $25.00 an acre, and upon cross examination, he shows that he knew the sales of tracts of land, adjoining Cleveland on the other sides and based his judgment upon actual transactions in real estate, occurring at or about the time of the transaction in controversy. He also testifies that he knew of no land selling for more than $25.00 an acre; even the finest of the bottom; that Cleveland was a town of about 400 inhabitants with a great deal of vacant property; many unimproved lots for which there was little demand; that the railroad prospects did not come until after the spring of 1901 (Record, page 214).

Defendant also introduced the testimony of G. W. Sutton, a banker and physician at Cleveland, and who had resided there since the opening of the country. He testified that he was one of the owners of the original townsite of Cleveland; one of the owners of a tract of land originally included in the townsite, and which had been vacated and sold about the time that this tract of land was sold; that it was a dark time in the history of Cleveland; very little demand for property, and that this property was worth from $15.00 to $25.00 an acre.

This witness also testifies to the sale of the Sloan 80, adjoining the town upon the other side, and a desirable tract of land, but for which the Town Company had no use, and although not pressed for money, sold for the same price as he fixes the value of this property.

Dr. Sutton shows fully the condition of the town at the time of this transaction, and that no land in that country was worth the price claimed by the plaintiff below (Record, page 221).

J. C. Morphis also testified in behalf of the plaintiff in error, as to the value of the land in controversy. Mr. Morphis had lived in Cleveland since the opening of the country; been postmaster there for some time; knew what lands were selling for in the vicinity of Cleveland, and he fixed the value of this land at $25.00 an acre, and goes into detail as to the business condition and demand for property at that time, showing a full knowledge of the situation (Record, page 229).

George Brentnall testified as to the value of this land on behalf of plaintiff in error. He had lived in Cleveland five or six years prior to the trial; knew the values of lands there in 1901, and was well acquainted with the land in controversy, and thought that $25.00 an acre was a good price for the land. He details fully the sales of land immediately adjoining Cleveland on all sides, showing that he fully knew what lands were worth and what he was testifying about (Record, page 236).

Mr. J. A. Powell also testifies as to the value of the land on behalf of plaintiff in error. He, like Mr. Brentnall, was a farmer, owning property adjoining the town, and knew the value of real estate there in the spring of 1901, and knew the actual transactions in real estate in that vicinity at that time, and lands adjoining the land in controversy as well as the other sides of Cleveland, and he fixes the reasonable value of the land in controversy at $15.00 an acre (Record, page 238).

The court having limited the number of expert witnesses to five, this closes all the testimony that plaintiff in error was permitted to introduce on that subject, and it appears that none of these parties were interested in any way in the property in controversy or in that addition to Cleveland; that they were all old residents, knew the history of the country, knew the value of lands, knew the price at which lands had been sold, and knew the development of the country; yet none of them place the value of this land over $25.00 an acre or $1,375.00 for the 55 acres. This shows, when weighed with the testimony of plaintiff below, not only that the price allowed by Wagg was consistent with fair dealing, and such a one as the minds of the parties might honestly meet upon, but is so overwhelming in its weight, as to absolutely satisfy the mind of any unbiased person, that Wagg allowed in this transaction every dollar that the land was worth, and that there is no substantial room for controversy.

After repeated motions to secure accuracy, certainty and completeness in plaintiff's allegations of fraud, oppression and undue influence, only the facts alleged in the second amended petition were elicited and the foregoing is the evidence by which plaintiff sought to sustain them.

Plaintiff complained that it was oppression and undue influence that caused her to make the final settlement with Wagg, and yet when she was asked the facts and influences that induced her to execute the settlement, here is the way she epitomized the whole grievance to her own counsel:

"Q. Now, I will ask you why it was that you executed this deed, this last deed, to Mr. Wagg and accepted back from him the deed of twenty-five acres?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Biddison: Exception.

A. Because of his oppression—

Mr. Biddison: We ask that that be stricken out, as not responsive to the question, and a conclusion.

Judge Bierer: It is her reason.

A. Sir.

Mr. Clark: Q. Tell the reasons that you accepted that offer, and made that deal with him. Why did you do it? A. Because he claimed to own the land, and it was the only way that I could see by which I could retain a home for myself and children. He claimed to own it, and while he made that little statement, that he wouldn't turn me out, yet I knew from my past experience with him that there was no confidence—and my sensibilities as a lady would not permit me to live in a house that some one else owned. And he claimed to own it, and under that pressure I couldn't do anything else that I could see; because I had no one to consult with; Mr. Herbert was away, and there was no one that I could ask in regard to it. There were no attorneys to speak of, if any at all, at Cleveland at that time."

We submit, that if in this testimony she gives the true influence and reason for the making of the settlement, that oppression and undue influence as known to equity jurisprudence had no place in the transaction. This extract from her testimony, taken from pages 139 and 140 of the transcript, states as strongly her case as it appears by any or all the evidence.

So far does this or all the evidence come from showing a case of undue influence or oppression, that even a liberal and judicious admixture of tears and hysteria does not bring the case within any recognized principles.

Upon these pleadings and this evidence, the trial court rendered judgment, not cancelling the "settlement deed" and restoring the parties to their original position, but decreeing that the last conveyance to Wagg, that is the "settlement deed" from under which he had conveyed 25 acres of the land to Mrs. Herbert as part consideration, and from under which he had dedicated public highways, and transferred large tracts to other persons, should be a mortgage, for which it had never been given, and then without even decreeing the foreclosure of said mortgage, or giving the plaintiff in error any relief whatever, or fixing a time for redemption by Mrs. Herbert or in any manner protecting the rights of this plaintiff in error, the court absolutely adjudicated the title of all the tract of land to be in Mrs. Herbert, not upon condition that she should do equity and pay the debt, or upon any other condition, but the decree is made absolute that she is the owner of the land and her title quieted, except as to a mortgage for an unascertained sum, which it is decreed this plaintiff in error holds.

This decree was affirmed by the Supreme Court of Oklahoma as shown by its opinion found at page 353 of the transcript, and which opinion it is our contention entirely misconceives the issues and is erroneous in the matters set out in the assignment of errors which may be grouped under the following general heads:

**First—The Supreme Court entirely misconceived the issues as specifically pointed out in assignments**

numbered 5, 6, 7, 8, 9, 10, 12, 13 and 51, there being no contention that the final settlement deed from Mrs. Herbert to Wagg was a mortgage, but solely whether it was procured by fraud, duress and undue influence.

Second—The second amended petition did not set out nor did the evidence prove fraud, duress or undue influence. This proposition is covered by assignments numbered 1, 2, 3, 4, and 42.

Third.—In Oklahoma, where a mortgage is a mere lien, a mortgagee not in possession may purchase the mortgaged property, and such purchase is not subject to be set aside in the absence of actual fraud, duress or undue influence. This proposition covers assignments 11 and 43.

Fourth.—In the case at bar the plaintiff was guilty of such laches and acquiescence in the final settlement as barred this action both because it was barred by the two year statute of limitations, and because the changed conditions made the avoidance of the transaction inequitable. This proposition is covered by assignments 14, 15 and 47.

Fifth.—The plaintiff was and is estopped to set aside the transaction by having taken conscious advantage thereof. Assignments 16 and 45 are discussed under this heading.

Sixth.—The court erred in holding that there was any fraud, duress or undue influence upon the part of Wagg. This proposition covers assignments 36, 37, 38, 39, 40, 41 and 44.

Seventh.—There was material error in the admission of evidence as specified in assignments 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

## ASSIGNMENTS OF ERROR.

1. The petition does not state facts sufficient to constitute a cause of action.

2. The court erred in holding that the said petition stated facts sufficient to constitute a cause of action.

3. The evidence does not prove a cause of action.

4. The court erred in holding that the evidence proves a cause of action.

5. The court erred in holding that the question before the court was a question "Whether a deed which purports upon its face to be an absolute deed was in reality a deed or mortgage," no such question being presented by the pleadings or evidence.

6. The court erred in holding that "extraneous evidence is admissible to show that the deed relied on in this case was only a mortgage," no such issue being presented by the pleadings.

7. The court erred in holding that the transaction in question in this case "was in substance and effect a loan of money upon the security of a farm," no

such issue being presented by the pleadings or the evidence.

8. The court erred in holding "That to insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise they may appear to be," no such question being presented by the pleadings or the evidence.

9. The court erred in holding that the purchase of mortgaged premises by the mortgagor may in any case be decreed to be a mortgage transaction and that the deed given in pursuance of a purchase can in any case be decreed to be a mortgage.

10.. The court erred in holding that fraud and undue influence and the unfairness of a transaction and unconscionable advantage either together or singly constitute ground for declaring an actual purchase to be a mortgage.

11. The court erred in holding that a sale of property to a mortgagee in Oklahoma is to be scrutinized to see whether any undue advantage has been taken of the mortgagor, it being provided by Section 10 of Chapter 50 of the Revised Statutes of Oklahoma of 1903, that "Notwithstanding an agreement to the contrary a lien and contract for a lien transfers no title to the property subject to the lien."

12. The court erred in determining and seeking to determine in this cause the question whether the transaction complained of was a sale or a mortgage.

it being specifically set out in plaintiff's petition that the transaction was a sale.

13. The court erred in holding that it was of great importance in this case "to inquire whether the consideration was adequate to induce a sale" as a circumstance tending to show that the transaction complained of was a mortgage.

14. The court erred in holding that under the circumstances the plaintiff was not guilty of laches.

15. The court erred in holding that under the circumstances of this case the plaintiff was not guilty of acquiescence.

16. The court erred in holding that the plaintiff was not estopped by her conduct and by the sale which she made of a portion of the land conveyed to her by plaintiff in error at the time of the final settlement, and thereby ratifying and taking conscious advantage of the transaction.

17. The court erred in holding that the trial court did not err in overruling the motion for a new trial made by plaintiff in error.

18. The court erred in holding that the court below did not commit error in the admission of evidence offered by plaintiff below and admitted over defendant's objection in the following particulars, to-wit:

The memorandum of September 30th, 1898 which with the proceedings in the trial court thereon being as follows:

"Mr. Clark: Now, we have here something that was introduced at the last term of the court. I don't know how it got into the papers or where it came from; but it was in a part of the stipulation, and seems to have accompanied that letter of September 30, 1898, taken from copy book, page 974. I think that is where it came from.

Thereupon Mr. Clark read the same, as follows:

'ORDER FOR DELIVERY OF DEED.

Cleveland, Oklahoma, Sept. 30th, 1898.

For value received, receipt of which is here acknowledged, we Mrs. and Mr. Herbert, husband and wife, executors of a certain mortgage to S. R. Wagg of Appleton, Wis., have executed a warrantee deed carrying the land mentioned in the above mortgage; such deed to be held in escrow by the Bank of Cleveland in trust for the further protection of the mortgage as hereinafter described.

It is agreed and understood that if the mortgagor is in default of interest for six months after the same is due and payable, the Bank of Cleveland is hereby authorized and instructed to deliver the aforesaid deed to S. R. Wagg or his order.

Witness my hand and seal this.................
In the presence of,

(Signed.)

Mary B. Herbert,
W. H. Herbert.'

Mr. Clark: I will state, as I understand it, this was produced last term of court from that record. I—has written on here in lead pencil. I don't understand that was ever signed by the Herberts, but whether it was or not, it bears the lead pencil inscription 'Mary B. Herbert, W. H. Herbert.' Its only production in this case has come from Mr. Wagg, which we submit is his understanding of the terms of the escrow.

Mr. Biddison: We object to it as irrelevant and immaterial, and simply a matter of negotiation, that never was concluded between the parties. There is no pretension that it was ever signed.

The Court: The objection is overruled at present.

Mr. Biddison: Exception."

19. The court erred in holding that the original escrow deed could not be taken from the bank by Wagg and recorded except after six months default in interest as provided by this improperly admitted memorandum, the same being in contravention of the terms relied upon by plaintiff below as shown by the allegations of her second amended petition and "Exhibit D" attached thereto wherein it is provided that the escrow deed was to be delivered to Wagg in the event of default of interest or other terms for six months.

20. The court erred in holding that "It is to be presumed that the court sitting as a chancellor, only considered material, competent and relevant testimony in making up its findings and rendering the decree in this case," when it admitted irrelevant, incompetent and immaterial testimony over objections to its relevance, competency and materiality and thereby held that it was relevant, competent and material.

21. The court erred in holding that the trial court did not err in admitting in evidence the letter from L. M. Drown to S. R. Wagg dated "Cleveland, Oklahoma, July 29th, 1898," which together with the proceedings as to its admission is as follows in the trial court:

"Mr. Clark: The next letter we offer is one from L. M. Drown, the son of A. A. Drown, who wrote the other, to S. R. Wagg.

Thereupon Mr. Clark read the same as follows, to-wit:

'Cleveland, Oklahoma, July 29, 1898.

Mr. S. R. Wagg, Appleton, Wis.:

Dear Sir and Friend: In reply to yours of the 23rd inst. regarding Herberts 80 acres, will say that I have had a talk with a man whom I consider the most conservative, cautious business man in Cleveland and a man of integrity.

He has been in business here over three years, and is as well acquainted with the country as anyone here. His name is C. A. Soderstrom. He says if this land were put up and sold at auction next week, it would undoubtedly bring $15.00 per acre, cash for its intrinsic value as farm land.

He says that a claim laying south of Herbert's farther from town, which has never been deeded from the government sold within the last year at $14.37 to the acre at $2,300 for 160 acres. Now Herbert's is undoubtedly much more valuable as he has his deed from Uncle Sam.

This man tells me that the Bank of Pawnee has loaned over $2,000 on 120 acres of land laying north of town which is as good farming land, but not as well located. I think these are as near rock bottom as you can get regarding that land. Regarding a lawyer, it seems that W. L. Eagleton, of Pawnee, Oklahoma, is considered the best posted and most reliable man in this section.

Your draft came to hand all O. K. this evening Thanks for your promptness. Those blank notes are all yours but I will get same from the bank tomorrow and send them to you. It is getting late and I must close. Will be more than pleased to be of any possible assistance to you down here. Let me know whenever I can serve you. With regards to all, I am,

Very sincerely, L. M. Drown '

Mr. Clark: We offer that letter in evidence.

Mr. Biddison: We object to the materiality and relevancy of the letters. It is simply an offer to show by inference what they don't have any direct evidence of.

The Court: Well, it simply shows what information was conveyed to him at that, and which he presumably acted upon.

Objection overruled.

Mr. Biddison: I understand, if the court please, that this is the declaration of a man trying to get a loan for Mr. Herbert.

The Court: I understand that. It is the information he had. If he had other information that he acted upon, it is competent to show it.

Objection overruled.

Mr. Biddison: Exception."

22. The court erred in holding that the trial court did not err in admitting a letter signed by S. R. Wagg dated Appleton, Wisconsin, September 3,

1898, and which letter and the proceedings with reference to the admission thereof is as follows:

Mr. Clark: We now offer in evidence letter from S. R. Wagg, written September 3, 1898.

The Court: To whom.

Mr. Clark: To one of the Drowns. It does not say.

Thereupon Mr. Clark read said letter, as follows:

"Appleton, Wis., Sept. 3, 1898.

My Dear Mr. Drown: I enclose your letter from Mr. Mayo. It looks fair on its face and if Herbert got the money as stated, from May and his friends, why I want to know it.

I do not want to get drawn into any legal question at all. I shall not go over $1,000 loan in any event, interest off in advance of 6 months. It is Herbert's business to clear matters up and not mine. I also enclose you Herbert's reply to my letters to him. 175 men with Mayo is quite a lot of them and at $50.00 each it is quite a sum in any besides Mayo claim it. Do not show these letters (but return to me after reading) except in strict confidence. Get at the facts and write me. If Mayo's object in writing me was to save me trouble and loss, I want to appreciate it properly by treating his letter with courtesy.

Yours truly, S. R. Wagg."

Mr. Clark: We offer that letter in evidence.

Mr. Biddison: We object to it as incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

Mr. Biddison: Exception."

23. The court erred in holding that the trial

court did not err in admitting a letter from S. R. Wagg to W. E. Deem, dated "April 21, 1901," and which letter and the proceedings with reference to the admission thereof is as follows:

"Judge Dale: We now offer in evidence the copy of the letter.

Mr. Biddison: To which we object as incompetent, irrelevant, and immaterial, and the proper foundation not having been laid.

The Court: Objection overruled.

Mr. Biddison: Exceptions.

Thereupon Judge Dale read the said letter as follows:

'April 21st, 1901

Mr. W. E. Deem, Cleveland, Okla.

My Dear Sir: Your inquiry at hand. If you want to buy my land west of Cleveland see Leroy M. Drown of that city.

Yours, S. R. Wagg.' "

24. The court erred in holding that the court below did not err in admitting the letter from Drown to Wagg, dated "November 8, 1901," and which letter and proceedings with reference to the admission thereof is as follows:

"Judge Dale: Here is a letter, Mr. Biddison, of November 25, 1902, with reference to the sale of a lot of lots there, and in this connection perhaps it is not necessary to read it; we may take occasion to read it later.

Judge Dale: November 8, 1901, from Mr. Drown to Mr. Wagg.

Thereupon Judge Dale read the same as follows, to-wit:

'Dear Mr. Wagg: There is going to be a sharp advance here in real estate, before a great many people realize it—'

Mr. Biddison: We object to this as entirely immaterial and irrelevant. Here is a letter long after the whole transaction; here is a friend writing to his friend, suggesting investments in that section of the country, long after this last settlement is made, and can have no possible connection with it.

Judge Dale: It throws considerable light on the manner in which they thought they were dealing with this woman; all these letters do; they show they knew they were taking advantage of her, is my understanding.

The Court: Proceed.

Objection overruled.

Mr. Biddison: Exception.

Thereupon Judge Dale continued to read from said letter:

'I am not pushing our lots now. We might as well get the benefit of the raise on them as to give it to some one else. I can handle this in my own name, and notify you of each transaction.' "

25. The court erred in holding that the court below did not err in admitting the testimony of W. T. Litten as to the value of the land in controversy.

26. The court erred in holding that the court below did not err in admitting the alleged copy of a letter from Wagg to Deem dated April 21, 1901

27. The court erred in holding that the court below did not err in admitting the testimony of John

R. Skinner as to the value of the land in controversy.

28. The court erred in holding that the court below did not err in admitting the testimony of Simeon Mott as to the value of the land in controversy.

29. The court erred in holding that the court below did not err in admitting the testimony of John Crismon.

30. The court erred in considering upon the appeal the evidence of each and all the foregoing witnesses.

31. The court erred in holding that the court below did not err in admitting the testimony of Mary B. Herbert as to her business experience, and which testimony is as follows:

"Q. I will ask you, Mrs. Herbert, at the time these negotiations for the giving of this land deed were opened up, about the time your husband left Cleveland, what your business experience had been, whether or not you had conducted the business or your husband had conducted it for the family?

Mr. Biddison: Objected to as irrelevant.

The Court: Overruled.

Mr. Biddison: Exception.

The Court:

Q. Answer the question.

A. Why, I was entirely inexperienced in business matters. I never had transacted any business; my husband had always attended to it. If I understand your questions, it was up to that time."

32. The court erred in holding that the court

below did not err in admitting the testimony of Mary B. Herbert with reference to offers for the hay upon the land in question, and which testimony was as follows:

"Q. Now, had you, prior to that time made any arrangements for disposing of that hay?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Biddison: Exceptions.

Mr. Clark: Q. The court says you can answer the question.

"A. Well, Mr. Nash, previous to that time had called to my home, and said that he desired to buy the hay, that its lying so near Cleveland, he could afford to give more for it because it would save hauling, and he offered me a dollar an acre for the hay. That is, in the field, on the ground.

Mr. Biddison: We ask that that be stricken out as not responsive to the question.

Judge Dale: I don't see how it is not responsive.

Mr. Wrightsman: That is grass, Your Honor, and not hay.

The Court: You are not a farmer, I understand.

Mr. Wrightsman: Yes, Your Honor, I have that honor.

The Court: Farmers speak of their hay on the ground very frequently, as well as after it is cut. The question was whether she had made any disposition of it.

A. I had the offer of it, and I replied to Mr. Nash that I thought so, that I would communicate with my husband, and let him know. And that was the way the matter rested when Mr. Wagg came."

33. The court erred in holding that the court below did not err in admitting the testimony of Mary B. Herbert as to why she made no effort to sell the land to a party in Muskogee, which testimony was as follows:

"Q. Well, I don't care anything about the reason for it. Now, I will ask you remember, simply to call your mind to the matter, of going to Muskogee to negotiate a sale? A. Yes, sir. Mr. Eagleton—

Q. Why didn't you do that?

Mr. Biddison: Objected to as irrelevant and immaterial.

Mr. Clark: Simply calling attention to the fact of the condition of the title.

The Court: Answer the question.

Mr. Biddison: Exception.

A. Because of the cloud on the title, was why I didn't go. I knew that people in Pawnee were located here where they could investigate it, and ask for information in regard to it, and whereas there I didn't know how I would go about presenting it to anyone, although I felt perfectly confident that I could secure a purchaser—

Mr. Wrightsman: Objected to as argumentative.

The Court: Well, never mind that.

Mr. Clark: Q. Had you any particular reason for believing you could get the money in Muskogee if you were able to go there and show you had the title to the land?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Mr. Clark: Q. Was there any person in Muskogee that had promised you to furnish you money, in case you required it to save the land?

Mr. Biddison: Objected to as irrelevant and immaterial.

Judge Bierer: To show the means of paying off the mortgage.

The Court: As I understand it, she has already stated she did not do that, because the title was not in condition.

Judge Dale: Perhaps you misunderstood the purport of her testimony. I asked Mr. Clark to ask her the question direct, if there was any person in Cleveland wanted to buy the land, and if she knew it.

The Court: At Cleveland, or Muskogee?

Judge Dale: At Muskogee. And I think he better ask it, and I think that will settle it.

Mr. Clark: I thought I substantially asked it, but I will try it again.

Mr. Clark: Q. I will ask you whether there was any person at Muskogee who had promised—

Judge Dale: No, who wanted to buy the land, direct.

Mr. Clark: Q. Who had offered to furnish the money. I want to put it that way first.

Mr. Biddison: Objected to as irrelevant and immaterial.

Mr. Clark: Q. Who had offered to buy the land?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: She can answer that.

Mr. Biddison: Exception.

A. There was.

Mr. Clark: Q. Who was it?

Mr. Biddison: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Biddison: Exception.

A. It was Mr. John Cobb of Muskogee, John O. Cobb."

34. The court erred in holding that the court below did not err in refusing the plaintiff in error the right to cross examine Mary B. Herbert as to former admission made by her with reference to her having consulted her attorney, and which testimony is as follows:

"Mrs. Mary B. Herbert, being recalled for further cross examination, testifies as follows:

*Recross Examination by Mr. Wrightsman.*

Q. Mrs. Herbert, you recall the fact of being a witness at the previous term of this court, concerning this same case, do you? A. Yes, sir.

Q. With reference to the month of May, in the year 1901, I will ask you if this question was not put to you: 'Q. Mrs. Herbert, had you not consulted attorneys during that time, and at that time, with reference to the effect of that deed? Answer: Consulted attorneys in May.' Did you or not so testify?

Judge Dale: Objected to as immaterial, and not contradicting any of the testimony given.

Mr. Wrightsman: We submit it is material. and in direct contradiction of her testimony of last night, to the effect that she had not consulted attorneys until she consulted her counsel, Mr. Clark, the year that the suit was brought, which was in 1903, of and concerning these transactions.

The Court: That does not indicate what year.

Mr. Wrightsman: I stated, Your Honor, as a predicate to my question, 'referring to May 1901.'

Judge Dale: That is not all. It does not show that she consulted him about the effect of the deed.

The Court: Does the question and answer there disclose that it was in 1901?

Mr. Wrightsman: No, sir, except by inference. I stated first, with reference to May, 1901.

Mr. Clark: Counsel may draw the wrong inference.

Mr. Wrightsman: I will just go back a little.

Mr. Wrightsman: Q. (Reading from manuscript). 'Question: Do you recall anything further in the conversation with him the following morning that you have not narrated? Answer: The extent of the conversation the following morning, as I recall it, was that I asked him about the indemnity' (I presume she means 'redemption') 'that I understood there was an indemnity law, and that my understanding was that the deed was not given to convey title, and I didn't understand what he meant by having the deed recorded, I wanted to have a fuller understanding of what he meant to do, and his reply to me was, 'Whoever tells you that a deed does not convey title is no friend of yours;' and that he had been asked in Pawnee what he intended to do with his land down in Cleveland. That is the extent of the conversation.' Question: That was the extent of the conversation? Answer: As I recall it, I think that is almost word for word.

Judge Dale: Who is that with,—Mr. Wagg?

Mr. Wrightsman: Yes, sir. I want to give what is just before that too. 'Question: Now, did you make any inquiry of him at that time as to whether he had taken legal advice on the question? Answer: No, sir, I had not. Question: Mrs. Herbert, had you not consulted attorneys during that time and at that time with reference to the effect of that deed? Answer: Consulted attorneys in May.' Now, I think that is clear as to the time.

Judge Dale: I don't think it is.

The Court: I don't either. It may have been the May of any year inquired about.

A. That referred to this May—

Judge Dale: Never mind, Mrs. Herbert.

The Court: Objection sustained.

Mr. Wrightsman: Exception."

35. The court erred in holding that the court below did not err in refusing to plaintiff in error the right to show by cross examination of Mary B. Herbert that she herself first proposed the division of the mortgaged premises in settlement of the mortgage debt, and the proceedings with reference to which were as follows:

"Q. Who suggested the division on the basis of twenty-five acres and fifty-five acres?

Mr. Clark: Wait a minute. I submit there is not evidence as to what that agreement between him and Mrs. Herbert was.

Mr. Wrightsman: He has asked him if there is such a fact.

Mr. Clark: No, sir, he is telling him, and asking him.

A. It was a compromise on both sides—

The Court: Wait a minute. I sustain the objection. If there was an agreement, what the agreement is, is a proper matter to be determined.

Mr. Biddison: Exception."

36. The Court erred in holding that Wagg committed a fraud upon the Herberts when he procured the escrow deed from the bank and had it placed on record on December 26th, 1899, and when he claimed title thereunder.

37. The court erred in holding that plaintiff in error had no right to take possession of the premises and collect the rents under the original mortgage and escrow deed.

38. The court erred in finding that the plaintiff in error either took possession of the premises or collected rents therefrom under the escrow deed and original mortgage, there being absolutely no evidence that he did either, and the proof being explicit that he did neither, and the allegations of the petition and amended petition being that plaintiff at all times resided upon the land in controversy.

39. The court erred in holding that Wagg had no right to claim title under the escrow deed and in holding that the escrow deed did not convey the legal title.

40. The court erred in finding that Wagg ever claimed that the escrow deed divested all plaintiff's title and interest in the property, there being no evidence to support the same and abundant evidence that he at all times admitted Herbert's right to redeem.

41. The court erred in holding "That the taking of possession of the premises, collecting the rents, claiming the title to the land and securing the final settlement deed was not only taking undue advantage of the mortgagors, but was an unfair and unconscionable transaction which cannot be upheld by a court of equity."

42. The court erred in holding that the allegations in the petition of fraud, oppression, undue influence and inadequate consideration are sustained by the evidence.

43. The court erred in holding that where a mortgage is a mere lien upon the premises, as in this territory, "It is not necessary to establish actual fraud, but only constructive fraud, and that an unconscious advantage was taken of the borrower."

44. The court erred in holding that "The status of plaintiff in error and defendant in error is clearly that of borrower and lender, of debtor and creditor, or mortgagor and mortgagee in possession," the same being in conflict with the pleadings in the case and the evidence introduced thereunder.

45. The court erred in holding that the doctrine of estoppel has no application in a case where a party might thereby have advantage from his own wrong.

46. The court erred in refusing to review the sufficiency of the evidence to sustain the allegations of

laches, acquiescence and estoppel in the amended answer.

47. The court erred in holding that there was no laches or acquiescence on the part of plaintiff below under the pleadings in the case.

48. The court erred in holding that there was no error in the decree in this case.

49. The court erred in affirming the judgment and decree of the court below.

50. The court erred in not reversing the judgment of the court below.

51. The court erred in affirming the decree of the trial court adjudging the settlement deed to be a mortgage and decreeing a contract to have existed and to exist between plaintiff in error and said Mary B. Herbert which they never entered into; the measure of right and recovery by a mortgagor under Oklahoma Statutes being greater than that of a defrauded grantor where conveyances by fraudulent grantee have been made to third parties, as is alleged to be the case herein; Section 15 of Chapter 16 of the Revised Statutes of Oklahoma of 1903 providing as follows: "Section 15. Any person purchasing or taking any security against real estate in good faith and without notice from one holding under an instrument purporting to be a conveyance, but intended as a security for the payment of money and which instrument has been duly recorded without any other instrument explanatory thereof, shall be protected to the extent of the purchase price of actual outlay oc-

casioned, with lawful interest, against all persons except those in actual possession at the time of such purchase or outlay."

52. The court erred in reinvesting Mary B. Herbert, defendant in error, with the title to the property in controversy without first requiring her to do equity.

53. The court erred in not requiring plaintiff below to put this plaintiff in error in *statu quo* as a condition of cancellation of the deed in controversy and in not decreeing plaintiff in error to have a lien upon the whole 80 acres described in his deeds and mortgage.

## BRIEF AND ARGUMENT.

Except as to the value of the property in controversy, it will be noticed that there is little dispute as to the facts, the disagreement being largely as to the construction to be put upon the facts, and as to whether or not they constitute fraud, oppression or undue influence.

It was the contention of plaintiff below that the entire transaction and the course of dealing between the parties should be taken into consideration, to determine whether or not there was fraud, and it was for this purpose that the plaintiff below, Mrs. Herbert, introduced in evidence all the letters and documents which were placed in evidence at all, and it was for this reason that they were gladly furnished the plaintiff below by this plaintiff in error. The letters, therefore, are not subject to any criticism, as being self-serving declarations, or introduced by this plaintiff in error, but being introduced by plaintiff below, as showing the entire course of dealing and the entire *res gestae*, the statements, propositions, offers, etc., therein contained, which show the purpose of fair dealing on behalf of this plaintiff in error, must be considered as part of the transaction, and are entitled to as much weight as any other portion, if indeed any other portion can be found, when construed in the light of all the facts.

This plaintiff in error concurs with plaintiff below, that the entire facts, circumstances and surroundings of the transaction must be considered so far as they are plead and properly put in evidence to determine whether or not plaintiff in error was guilty of any wrong.

**The court entirely misconceived the issues in the case and the character of the relief to be given by the decree if plaintiff was entitled to recover.**

It will be noticed from plaintiff's second amended petition in the court below that her only contentions were as follows:

1. Plaintiff in error obtained possession of the "escrow deed" before he had a right so to do, and that by placing it on record, and insisting that it conveyed title, and that the plaintiff below no longer owned the land, and that he himself was the owner thereof, he oppressed plaintiff below into giving the final "settlement deed" under which plaintiff in error claims title.

2. Plaintiff below in her petition claimed and claims that plaintiff in error, by force and over the protest of the plaintiff, took possession of a portion of the said lands and deprived her of the means of complying with the terms of the said note and mortgage.

3. Plaintiff below further contends that plaintiff in error, at a time before the maturity of the note and mortgage, refused to accept the principal and amount

of interest then accrued, and release the land unless he was reimbursed for expenses he had incurred in making and protecting the loan.

4. Plaintiff below contended that by reason of the aforesaid facts, and oppression and undue influence therefrom resulting, and by reason of the embarrassed financial condition of plaintiff below, the plaintiff in error obtained the settlement deed under which he claims title for a grossly inadequate consideration, and that the settlement was therefore fraudulent.

Stripped of all the contorted and involved language about plaintiff in error having, "by taking advantage of the disadvantages of the plaintiff below, and by taking advantage of his own advantages and her embarrassed financial condition, and by reason of misconduct, fraud, undue advantage, over-persuasion, undue influence, and by reason of his fraudulent, wrongful, oppressive and unjust claim and over-persuasion, and taking advantage of the position and relationship existing between the plaintiff in error, and the plaintiff below," obtained said deed, there is not a single allegation of fact as a foundation for plaintiff's prayer, to set aside the "settlement deed," that is not contained in the foregoing four statements. There are other allegations as to rights for an accounting growing out of the transaction, but there is not another single allegation as a basis for the judgment, or for an attack upon the validity of the "settlement deed."

**It is the contention of plaintiff in error that this**

petition, if all these facts were admitted, does not state facts sufficient to constitute any right to relief.

It is further contended that the evidence does not sustain the allegations of the petition, fairly construing the most adverse testimony and taking it as uncontradicted.

Plaintiff in error claims further, that even if plaintiff below had made out a case by her petition and evidence, that the unquestioned, undisputed and admitted facts show a complete defense.

In passing we may remark that plaintiff below is limited in her allegation of fraud, oppression, undue influence, etc., by her allegations of fact.

"A general averment of fraud in a bill in equity is to be taken as limited by the specific facts set forth to show wherein the transaction was fraudulent."

*U. S. vs. Des Moines, etc., Ry.*, 142 U. S., 544.
*Wiseman vs. Eastman et al.*, 57 Pac. Rep., 400; S. C. 21 Wash., 163.

"A mere general averment of fraud and illegality, without stating the facts on which the charge is based, presents no issue and no proof is admissible thereunder."

*Kingman P. & W. Ry. Co. vs. Quinn,* 25 Pac. Rep., 1068; S. C. 45 Kan., 477.
*Woods vs. Carpenter,* 101 U. S., 135.
*Southall et al. vs. Farish,* 1st L. R. A., 641.
*Bardwick et al. vs. Dillon et al.,* 54 Pac., 785; S. C. 7 Okla., 535.
*Lee vs. Mehew,* 56 Pac. Rep., 1046; S. C. 8 Okla., 136.

> "Undue influence, to destroy the force of a deed, must be such as to overcome the freedom of the grantor's will: and pleadings to be sufficient must aver the facts, in substance, which show the domination of the grantor's will."
>
> *Jackson et al. vs. Rowell et al.*, 4 L. R. A., 637.

For convenience we will treat the insufficiency of the petition and of the evidence to state and show a cause of action together, thereafter considering the sufficiency of the defense and lastly the erroneous character of the judgment rendered, even though the plaintiff were entitled to recover.

## THE ERRONEOUS CHARACTER OF THE DECREE.

The decree in this case is that the settlement deed is a mortgage and as such mortgage a lien upon the property therein described. And of this plaintiff in error complains.

We feel confident that there cannot be found in the history of equity jurisprudence a single case to serve as precedent for the doctrine that fraud, oppression or undue influence, or inadequacy of consideration, could turn an instrument given as a conveyance into a mortgage. It will be noticed that there is no contention that this deed was not intended as a conveyance.

There is no contention that either party to the settlement deed intended it to be a security: on the contrary, all the evidence was that it was given in payment of the debt and that the debt was thereby extinguished. Without a debt there could be no mortgage, and without a mutual intent to secure that debt, no conveyance could be a mortgage.

> *Duell et al. vs. Leslie et al.*, 106 Southwestern Rep., (Mo.) 489.
> Jones on Mortgages, (3rd Ed.) 269.
> *Bailey vs. St. Louis Transit Company*, 188 Mo., loc. cit. 492.

Courts of equity have no more power to make contracts for people than courts of law, and they cannot by their decrees change conveyances into mortgages, if the conveyances were by the parties intended as such. Fraud and undue influence are recognized in equity jurisprudence as *grounds for cancellation of instruments*, and if the court in this case found that the plaintiff in error was guilty of fraud and undue influence in obtaining the settlement deed, then the decree should have been for its cancellation, and whether the action would be denominated a bill to redeem or an action for the cancellation of the "settlement deed," cancellation or redemption would not be decreed, except upon condition that plaintiff put plaintiff in error in *statu quo* by first satisfying the mortgage debt. This is elementary. The doctrine, that, "he who seeks equity must do equity," has always required courts from the earliest period to impose the condition of payment before granting the relief.

In 1 Pom. Eq Jur. Section 386, the rule is stated, that the plaintiff will be required as a condition to his obtaining the relief which he asks to provide for the equitable rights the defendant may have, and to that end the court will by its affirmative decree award the defendant whatever relief may be necessary, in order to protect and enforce his rights. And in Section 392 of the same work, the author says the principle has special application in actions for redemption.

*Bremer et al. vs. Calumet & C. Canal & Dock Co.*, 18 N. E. Rep., 321.

In this case the Supreme Court of Illinois lays down the rule that it is error to directly provide for the conveyance of lands in an action to redeem or cancel an instrument, but that the decree should direct the payment of the money due the party holding the land within a specified time, and that in event of failure so to do, the bill stand dismissed.

This was always the rule in equity in cases of bills to redeem. And it will be noticed that the court in the case at bar treated the action as one to redeem, so that upon the theory of court and counsel for plaintiff below the decree of the court should have been one fixing the amount to be paid for a redemption, and the time within which that period, the action should stand dismissed.

*Reed vs. Lansadale*, 3 Ky., 6.
*Pittman vs. Thornton*, 66 Me., 469.
*Beach vs. Cooke*, 86 Am. Dec., 260.
*Miller vs. Gunderson et al.*, 67 N. W. Rep., 769.

In *Cline vs. Robbins*, 44 Pac. Rep., 1023, the Supreme Court of California says:

"An action to have a deed, absolute on its face, declared a mortgage, and for an accounting and other relief, is in the nature of a bill to redeem; and the decree should not be for foreclosure, but that on payment of the amount due within a reasonable time, to be fixed by the court, the mortgage shall be adjudged to be satisfied, and that if not so paid, the action shall be dismissed."

In the light of these authorities and the well known principles of equity jurisprudence, it is clear that the court could not rightfully decree plaintiff to be the owner of the property, without first determining whether or not there would be anything due the defendant upon an accounting, and requiring the payment of that sum, if any was found due, before the cancellation of the settlement deed. To render the decree actually entered in this case, it was necessary for the court to assume, what nowhere appears in the evidence, that upon an accounting between the parties the balance would be coming to the plaintiff and not to the plaintiff in error.

It is the very essence of the right of cancellation or of redemption, that the party seeking such equity should first do equity, and the court will not grant the relief, and it has not been the practice of courts of equity to grant the relief until equity was done and the defendant put in *statu quo* or paid in full, and it is the very essence of a bill to redeem, that the account should first be stated between the parties, and the payment of the balance ordered as a condition of redemption, and a time fixed within which the payment should be made. And the authorities all hold that the decree should be, that unless payment is made within the time fixed by the court, the bill to redeem shall stand dismissed.

Notice the difference of the position of plaintiff in error under such a decree from its position in the case at bar. Under such a decree he needs seek no affirmative relief for any sum due him, but unless he is paid within the fixed time, he becomes the absolute owner of the property free of any equities on behalf of the plaintiff. His rights are ascertained under the decree. In the decree at bar there is no determination of his rights. He is decreed to hold a mortgage for an amount yet to be ascertained, but even that mortgage is not foreclosed. no sale of the property is ordered for the satisfaction of the debt, nor is there any method by which such a mortgage can be foreclosed. It is a mortgage without terms or conditions, a judicial mortgage so to speak, a contract decreed to exist by the court which the parties never entered into. How, in what forum and where can such a mortgage be foreclosed after the debt is ascertained by the accounting? By this decree the property is taken away from the plaintiff in error, and he is left to seek his remedy against plaintiff below, from whom he may or may not be able to secure his claim. It is undoubtedly proper for the court to find and enter a finding that a conveyance is a mortgage or that it is voidable and by interlocutory order direct the accounting. But this is very different from entering final judgment and pronouncing the consequences and the sentence of the court by which plaintiff is given unconditional relief at a stage of the proceedings at which an essential element of the decree is undetermined.

There may be nothing due plaintiff in error, and if so, then this decree is erroneous in adjudging that he has a mortgage on the property. There may be much due plaintiff in error, and if so, the authorities are uniform that reimbursement is a condition precedent to relief The court could not know at this stage of the proceedings what the ultimate decree should be. It may be that the decree should be absolute, and it may be that it should be conditional upon payment of an unascertained sum within a time to be fixed by the court, and it may be that it should provide for the dismissal of the bill upon defendant's motion if the money is not paid.

In any event it was error to enter the final decree as absolute before determination of these matters, for by what authority can the court assume that nothing is due plaintiff in error, and make the cancellation of the mortgage absolute at this stage of the proceedings?

We insist, therefore, that whether the action be taken as one for cancellation of the deed, or, as treated by the court, an action to redeem, that the court could not rightfully grant the relief until he had determined the equities of the parties and made proper provisions therefor, by making the relief granted contingent upon plaintiff doing equity within the time to be fixed by the court. The relief granted by the court is not only illogical, but it is inequitable and was prematurely and improvidently granted. The most that the court would have been entitled to do at the stage of the proceedings at which it rendered final judgment was to have entered a finding against the defendant that the mortgage was fraudulently obtained, and ordering an accounting to determine the conditions of cancellation or redemption, and we insist that the decree then should have been for cancellation.

**Second: The second amended petition did not set out nor did the evidence prove fraud, duress or undue influence. This proposition is covered by assignments numbered 1, 2, 3, 4 and 42.**

Taking plaintiff's first contention, that plaintiff in error fraudulently obtained possession of the "escrow deed" and by and through his claim of ownership founded thereon oppressed plaintiff below and obtained by such influence, the "settlement deed," we submit in opposition thereto the following propositions:

1. *Plaintiff in error had an absolute right to take the deed at the time he did.*

2. *The claim of plaintiff in error was correct as matter of law.*

3. *Whether plaintiff's claim was correct as matter of law or not, it did not constitute fraud or oppression for it was not a claim that the transaction was in fact other than what the parties by their agreement intended it to be, but was a mere construction of the legal effect of what had been done.*

In other words, plaintiff in error made no claims that he had bought the property, but that he had acquired a legal title thereto by virtue of the "escrow deed," not denying that the transaction was a loan of money.

Taking up these propositions in order, it occurs to us that it is elementary, that the final contract between the parties is contained in the note and mortgage, and that prior negotiations are presumed to be contained therein.

## PLAINTIFF IN ERROR COMMITTED NO FRAUD IN TAKING UP THE ESCROW.

Counsel for plaintiff below placed great stress upon the letter Wagg wrote to Herbert, dated September 25, 1898, and wherein he said that the second year's interest would not become due and payable until the end of the second year, and that he would give six months' grace upon that before the property should become his. The note and mortgage actually made, and it appears from the evidence that several instruments had been drawn, and that two were actually present at the time this note and mortgage were executed, and that Herbert had selected from the various instruments the one which he would sign, must be held to embrace therein the final contract, and it expressly provides that all interest at 10 per cent per annum should be payable in advance. Nothing further than this need be stated, and yet we call the attention of the court again to Wagg's letter to Herbert and wife of November 12th, prior to the execution of the mortgage, in which letter Wagg expressly sates that it is the intention of the contract, that in event of the failure of Herbert and wife to comply with the terms of the mortgage, that the property should become his. And this letter shows also that Herbert and his wife understood that to be the legal effect and to be intended by the contract, for this letter is in response to their statement of that proposition.

Not only was plaintiff below in default of interest at the time Wagg took the escrow deed from the bank but they were also in default of taxes and had permitted the property to be advertised for taxes, and, above and beyond all this, their mortgage contained the stipulation that the property should be and was free and clear of all incumbrance at the time of its execution, when, in truth and in fact, these same taxes were then assessed against the property and were not paid, so that at the very time of the execution of the instrument one of its conditions was broken, although not known at that time to the plaintiff in error, and he did not take up the deed for more than a year after that time, having recorded the same December 26th, 1899, more than six months after the time when the taxes, by the terms of the mortgage, should have been paid for even that year, and the mortgage provided that the taxes should be paid not later than May. Therefore, Wagg had the right to foreclose.

Therefore there is no light in which you can view these facts, which are absolutely unquestioned, that does not show that Wagg had the absolute right to take the deed out of escrow at the time he did so, but even then he did nothing further with reference to the matter, made no claims of title or otherwise, until more than six months after the second year's interest had become due, and then and thereafter he made the claims and the offers hereinbefore stated.

No construction of these claims and statements can be had that does not convince that Wagg was simply seeking security for his money, and that he was not seeking to obtain the land or to claim it upon the theory that the original transaction was a purchase.

What can be stronger than Wagg's letter to Herbert dated April 30, 1900 in which he says: "I do not propose to be hasty or unfair, if you want to pay the interest up, you can do so, I have not asked for any full payment of principal; interest will do. I do not intend to foreclose or turn you out of the house, and shall not unless you fail to do anything." And his letter of April 14, the same year, to Herbert and wife at Cleveland, in which he tells them. "that the loan of October, 1898, is in default of payment of interest, and asked them to make up all payments due to date either to him or to place to his credit in the bank at Pawnee?" Both of these letters are written just before Wagg's visit to Cleveland. And in that of April 14th he calls the special attention of Herbert and wife to the fact that allowing six months from the time the second year's interest became due in the fall previous, that the six months' grace will be up in April, and that he would therefore be entitled to the property by virtue of the "escrow deed." But we ask the court to read all the letters.

And again in his letter of September 15, 1900, to Mrs. Herbert he says: "I hope that you may be able to realize your wishes in securing a home for yourself and boys. If you cannot make this sale I will devise another plan later."

And on December 24th, 1900, Wagg writes Mrs. Herbert: "Referring to your last communication wherein you wanted time to sell extended to January first. I hope that you have been able to find a buyer. However, you can have until March first next, if you need such time."

Is this the language of oppression? Is this the heavy hand of avarice and greed?

Yet these are only some of the many offers and efforts that Wagg had made to enable them to pay him his money and interest.

Did Mrs. Herbert think that she had been harshly dealt with when she wrote her letter, found on page 90 of the record, in which she thanks Mr. Wagg for consenting to a division of the land?

So much for the moral aspects of the allegations of fraud, oppression, undue influence, and the evidence by which such allegations are attempted to be sustained

Is it harshness to ask your debtor to pay? Is it cruelty to wait 18 months after your debtor has made default in interest before pressing for a final settlement? Is it fraud and undue influence to keep up the taxes during your period of patient waiting? Is it, outrage to give your debtor every opportunity to sell the mortgaged property to pay you and for you to offer every assistance in that respect? Ought it to bring the blush of shame to the face of an honest business man to be wheedled into consenting to a division of the land, after trying in vain to procure a settlement in some other way?

It is to be remembered that there is no allegation in the petition that Mrs. Herbert was misled by Wagg's claim that he held the legal title to the land, or that she was ignorant upon that matter. Nor is there any allegation that she relied upon his statement of his rights, or that she did not know her own. Nor is there evidence to sustain any such position.

Her own evidence is that she had heard she had a right of redemption. Wagg and Drown both testified that she had so told them. Wagg's letter, above cited, tells her that he does not want principal, that he only wants the interest kept up, and that she may redeem.

Indeed, the settlement actually made shows that Mrs. Herbert knew that she still had rights in the land because the settlement was not made upon the basis of Wagg's ownership, but on the basis of her ownership. She makes the conveyance. Why should she do this if she understood and believed the land was Wagg's? Would the settlement not have been made by Wagg conveying her the 25 acres without her conveying to him if she believed in his ownership, without her having a right of redemption? More than this. Mrs. Herbert is estopped from asserting that she did not believe that she owned or had an interest in property to which she gave a warranty deed for a valuable consideration in settlement. Wagg would be estopped from denying her title by accepting her deed and the estoppel is mutual.

### PLAINTIFF BECAME POSSESSED OF THE LEGAL TITLE.

But the claim of plaintiff in error was right, as matter of law, or else the Supreme Court of California, on a statute identical with ours, did not know the rights it was attempting to adjudicate, in

> *Bradbury vs. Davenport et al.*, 52 Pac. Rep., 301.

There the court says:

> "A conveyance of mortgaged premises by the mortgagor to the mortgagee. without undue influence or imposition, by delivery of deed in escrow, to be delivered in case of non-payment of the mortgage debt within a certain time, is not invalid under Civ. Code, Sec. 2889, providing that 'all contracts for the forfeiture of property subject to lien in satisfaction of the obligation secured thereby and all contracts in restraint of the right of redemption are void.'"

Nor did the same court understand the rights of parties when it decided

> *Vance vs. Anderson et al.*, 45 Pac. Rep., 816.

That the legal title may pass in this territory upon a transaction of mortgage so that the cancellation of the defeasance will vest an unconditional title in the mortgagee is decided to be the law of this territory, in *Seawell vs. Hendricks* 46 Pac. Rep., 557, where the Supreme Court says:

> "Where an absolute deed to land is given accompanied simultaneously by bond or agreement of defeasance, the latter may, upon agreement and consideration between the parties thereto, be surrendered and cancelled, so as to vest the estate unconditionally in the grantee by force of the first deed, provided the transaction is conducted with fairness, both as between the parties and against the creditors of the mortgagor."

This does not differ in principle from the doctrine contended for by Wagg, that the legal title of the property passed to him. He nowhere denied Mrs. Herbert's right of redemption, prior to the making of the final "settlement deed," and yet in the California case above quoted the Supreme Court of that state held absolutely that the deed conveyed title, and that the mortgagor had no right of redemeption after the delivery of the escrow deed, going much further than Mr. Wagg contended, and much further than we now contend, for we do not claim under the "escrow deed" but under the "final settlement" deed. See also

*McDonald vs. Huff*, 19 Pac. Rep., 499.

### AN ERRONEOUS CLAIM IS NOT FRAUDULENT.

*We come now to our third proposition, that it is not fraud to make an erroneous claim. In other words, it does not constitute undue influence to do all that plaintiff claims that Wagg did and in the manner and with the intent ascribed.*

The statements made by Mr. Wagg as to his legal rights are to be carefully distinguished from the facts in the case of *Russell vs. Southard et al.*, 12 Howard, 139, which is relied upon by defendant in error. In that case the Supreme Court of the United States says:

> "To insist on what was really a mortgage, as a sale, is in equity a fraud."

And there is no question as to the correctness of the decision. Mr. Wagg was not contending that the transaction was a sale to him in the first instance, or that the papers were other than what plaintiff below contended them to be. In the Russell-Southard case the fraud complained of was that the grantee in the deed denied that he had loaned money on the deed as security, but that the consideration for the deed was money paid as upon purchase, and the court said that was a fraud. It is not subject to controversy, that in the case at bar, the parties intended the escrow deed to convey title, and that it should absolutely transfer the land upon its delivery to Wagg in consideration of the mortgage debt. He did not deny that the transaction was a loan, but simply insisted that this escrow deed should be given the effect which the parties originally intended it should have, to the extent of transferring to him a defeasible title, not one that was not subject to redemption.

But if Wagg did insist that Herbert had no right of redemption, and that he was the absolute owner of the property by virtue of the deed, and if either fact which plaintiff below claimed to exist, but failed to prove, were true, we still insist that all such claims did not constitute fraud, oppression or undue influence. As sustaining our position that it is neither fraud, oppression nor undue influence for a creditor to make claims in excess of his legal rights, we submit the following authorities:

*Nell vs. Carson*, 2 S. W. Rep., 107, where the court says:

"Testimony of a devisee's grantee, who has conveyed her interests in the lands to a creditor of the estate, that she sold it because he told her that he could take the place, and everything she had, is insufficient to establish a fraud, for which the sale should be set aside."

In the case of *Schramm vs. Haupt*, 37 N. W. Rep., 798, the Supreme Court of Minnesota holds: That the assertion of title by a party seeking to secure a deed from another is not fraudulent, and uses this language:

"The statement to the plaintiff that he had such a title was not, therefore, fraudulent. She knew that the title which he claimed to have was only such as he had acquired by the tax proceedings referred to, and she had gone to him to 'settle with him,' as she testifies, concerning that very subject. Under these circumstances the defendant's assertion of the title can be given no other effect than the expression of an opinion."

To the same effect is *Perkins vs. Frinka*, 15 N. W., 115, where the court says:

"When the parties whose rights are questionable and doubtful and who have equal means of ascertaining what these rights are come together and settle these rights between themselves, a court must enforce the agreement to which they may fairly come at the time, although a judicial decision should afterwards be made, showing that these rights were different from what they supposed them to be, or showing that one of them really has no rights at all, and so nothing to forego."

To like effect is *Thompson vs. Phoenix Insurance Co.*, 46 Am. Rep., 357, where the court says:

"One who has a claim against an insurance company for loss by fire, and is induced by the false representations of the company's agent, that his policy has been forfeited by non-occupancy, to settle for less than the amount of his claim, has no action against the company for such representation."

An instructive case upon this proposition is *Georgia Home Insurance Company vs. Warten*, 59 Am. St. Rep., 129. See also *Fish vs. Clelland*, 33 Ill., 238, in which last case the Supreme Court says:

"Representation of what the law will or will not permit to be done is one upon which the party to whom it is made has no right to rely, and if he does so it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."

The rule is fully stated with an extended citation of authorities in 14 Am. & Eng. Enc. Law, (2nd. Ed.) pages 54 and 56.

In *Severance vs. Ash*, 17 Atl. Rep., 69, the court says:

"Suit to cancel deed, on the ground of fraud, held not to be fraud, to obtain deed for nominal consideration, where debtor did not expect to be able to redeem the property, by party who claimed to own a portion of the land, debtor being advised that he had a right to redeem."

There is a case of apparently very strong equity, which the court holds is still insufficient to warrant the setting aside of mortgages, secured under great pressure. This case is *Morton vs. Morris*, 18 C. C. A., 611; S. C., 72 Fed., 392.

In this case a settlement between partners was had at a time of great financial stringency and crisis. The mortgagor partner was largely indebted. The mortgagee partner took advantage of the business situation and of the danger to defendant's credit to enforce an unfair settlement, and by demanding an immediate settlement, and threatening in bad faith and for the purpose of coercion to institute a suit for an accounting, and to demand the appointment of a receiver, compelled mortgagor to agree to the settlement that was unfair and as part of which the mortgages were given.

The court held that these facts neither constituted a defense to the foreclosure of the mortgages nor grounds for cancelling them.

In *Stewart vs. Miller*, 7 S. W. Rep., 603, the court discusses the effect of threats of suit to induce a settlement and uses this language:

> "In an action to set aside a deed for fraud, it appeared that plaintiff was in possession of certain land which defendant claimed; that a confidential agent of plaintiff brought a message to her from defendant that he would sue on his claim unless she compromised by dividing the land with him; that upon the receipt of such message she consulted her friends and told such agent to prepare such deed: that defendant had no such communications with plaintiff except through such agent; that defendant afterwards took possession and improved his moiety of such land. *Held*, that plaintiff failed to sustain the burden of proving fraud, which was on her."

In *Walker's Admr. vs. Farmers' Bank*, 14 Atl. Rep., 823, the New Jersey Equity Court discusses the effect of pressure to induce settlements and says:

> "The closest scrutiny of the entire transaction as disclosed by the evidence fails to disclose any desire, much less design, on the part of the bank to use either the *lavari* or any other means derived from its relation as Walker's mortgagee to procure the conceyance to it of his lands. The conveyance was not under the pressure of the bank or its *lavari*, but under the stress of his own insolvent situation, which clearly disclosed that his lands, under his ownership and management, would neither produce income sufficient to pay his annual interest, nor sell for enough to pay his aggregate indebtedness to the bank. It cannot be maintained that the use, *bona fide*, of a *lavari facias*, when the mortgagee has a well grounded and reasonable apprehension of loss, unless it immediately be issued and executed, is of itself an inequitable pressure upon the mortgagor, even though he be enfeebled in body or distressed in mind by his embarrassed condition. In this state every one who executes a mortgage gives the right to the mortgagee to proceed in case of default by this prescribed mode of judicial sale and make his debt out of the mortgaged lands. It was the right of the bank, and its duty under the circumstances proven in this case, to secure their debt out of Walker's property."

This case is a very strong one and the facts of defendant being unable by his own management of his own lands to either pay the interest or to sell the lands for sufficient to pay the debt have great similarity to the case at bar.

As sustaining the general proposition that it is not fraud or oppression for a creditor to threaten his debtor with a civil suit, see

> *Dispeau vs. First National Bank Pawtucket*, 53 Atl. Rep., 868.
> *Hilburn vs. Buckman*, 7 Atl. Rep., 272.
> 10 Am. & Eng. Enc. Law, (2nd. Ed.) 344.

That in order to constitute undue influence, the grantor must be deprived of free agency is decided in *Conley vs. Nailor et al.*, 118 U. S., 127. The court says:

"In order that a deed may be set aside on the ground of undue influence, the influence must be such that the grantor has no free will, but stands *in vinculis*."

> *Jackson et al. vs. Rowell et al.*, 4 L. R. A., 637.

That misunderstandings or misstatements as to the party's legal rights will not vitiate a contract is decided in *Upton vs. Tribilcock*, 91 U. S., 45, where the court says:

"Misrepresentations of the law will not vitiate a contract, where there is no misrepresentation of the facts."

Also,

> *Allen vs. Galloway*, 30 Fed., 467.
> *Abott vs. Treat*, 3 Atl., 47.
> *Kingsberry vs. Sargent*, 22 Atl., 126.

"In order to constitute fraudulent misrepresentations, sufficient to set aside a deed, it must appear that the parties making them knew them to be untrue."

> *Jones vs. Foster*, 51 N. E. Rep., (Ill.) 862.

In the light of these authorities, as well as that of reason and equity, we cannot see how any thinking mind can conclude that this case is within the principle of *Russell vs. Southard et al., supra.*

In that case the fraud consisted in the grantee insisting that it was the intent to make a purchase and sale of the property, and that the parties could not go beyond the writen instrument to determine the intent.

In the case at bar there is no question but that it was the intent, whatever may have been the legal power of the parties, to make the escrow deed a conveyance of the property upon breach of the conditions. Was it fraud for Wagg to say to Mrs. Herbert: "Our agreement was that this property should become mine upon default of six months' payment of interest or taxes?" It will be remembered that he never made such a claim until more than six months after the maturity of the second year's interest.

Is it wrongful or oppressive for a creditor to say to his debtor: "You agreed with me upon certain conditions, and now I ask you to fulfill them, although I still concede and recognize your rights to redeem, and prefer that you would pay me my interest." To answer these questions in the affirmative requires a tenderness of conscience of which we have no conception, and that is certainly uncommon in the business world.

As before noticed, there is no allegation that plaintiff below relied upon any statements or claims that Wagg made with reference to his rights, or that they were false in fact, the contention of plaintiff being that the relationship between the parties made the claim fraudulent, even though they make no allegations that Mrs. Herbert was ignorant of her rights. But assuming that Mrs. Herbert was ignorant of her rights, and that they had plead that fact, and had some evidence to prove such a contention, which they have not, their position would not be bettered.

> *Foster vs. Mansfield, Coldwater & Lake Mich. Ry. Co.*, 146 U. S., 88.

The court in this last cited case lays down the rule as follows:

> "If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest and knows that proceedings are pending, the result of which may be prejudicial to such interest, he is bound to look into such proceedings so far as to see that no action is taken to his detriment."

In *Georgia Home Insurance Company vs. Warten*, 22 South. Rep., —, the court says:

> "Allegations in a complaint seeking to set aside a settlement of a fire loss, that plaintiff was hurried and ignorant of her rights under her policy, and did not read the papers signed by her, in connection with such settlement, are surplus and irrelevant. An insured cannot set aside a settlement of a loss made with the knowledge of the facts by both parties, by reason of the false representations of the insurer, that the insured was bound by an inventory taken two months before the loss, and that the party insuring was liable for only three-fourths of the value of the goods lost, from which the bill of goods

saved must be docked, and that the discount must be allowed for a cash payment, since they are affirmance of matters of law equally open to the inquiry of both parties."

In *Wetzel et al vs. Minn. Ry. Transfer Co. et al.*, 12 C. C. A., 490; S C., 65 Fed., 23:

"Ignorance of one's rights will not serve as an excuse in a court of equity for not bringing suit to enforce them when such ignorance is fairly attributable to negligence or to the party's failure to make such inquiries with respect to his rights, as with the information at his command he ought to have made."

See also *Wetzel et al. vs. Minn. Ry. Transfer Co. et al.*, 169 U. S., 237.

**The next fraud complained of is that Wagg took possession of the land and thereby deprived plaintiff of the means of paying the debt. To this we reply:**

## PLAINTIFF IN ERROR DID NOT TAKE POSSESSION OF THE LAND.

Laying aside then as determined the question of alleged oppression and undue influence by reason of taking the deed out of escrow, and making claims of ownership of the property, we come to the claim of plaintiff below that plaintiff in error took possession of the property and deprived her of the means of paying the interest and debt.

This can be disposed of by a blunt, bare assertion that there is no evidence of anything of the character, and that the allegation is absolutely and utterly false.

Mrs. Herbert, herself, testifies not that they took possession of the property by force or fraud as alleged, but that Wagg simply asked her if he could not have the hay to apply upon the indebtedness, and that she made no objection. (See Mrs. Herbert's testimony, page 131 of the transcript.)

There is no other evidence upon this proposition, excepting Mr. Wagg's account of the same conversation heretofore referred to, and also Mr. Drown's account of the same conversation, together with Mr. Wagg's letter to Herbert dated April 30, 1900, (on page 94 of the transcript) in which Wagg asks Mr. Herbert to apply the hay crop to help pay the interest; also his letter to Eagleton, dated May 17, 1900, in which he grants Eagleton's request on behalf of the Herberts for an extension of time, on condition that the hay crop should be applied to the payment of the back taxes, etc.

There is also the testimony of Wagg that he never took possession of the land, and the testimony of Drown that he did not take possession of the land. (See Drown's testimony before quoted from page 243 of the transcript.) It is also in evidence that the lands were occupied during a portion of the time by some other parties living in another house than the one occupied by Mrs. Herbert, and on a different part of the land, so it is absolutely clear that there is no oppression by taking possession of the land, and it is not necessary to quote authorities as to what constitutes a taking possession either by force or otherwise.

The going upon the land to secure the hay crop, whether by direct assent of Mrs. Herbert or by her failure to object, as she testifies, upon request, and the removing therefrom the hay, and shedding it elsewhere, does not constitute the taking possession of the land, nor the occupancy of the land, nor does it even constitute trespass.

**Plaintiff's next complaint is that defendant refused to accept principal and accrued interest and cancel the loan before its maturity unless he was reimbursed for expenses in making and protecting the loan. Our response is that:**

### PLAINTIFF'S CONDITION OF CANCELLATION OF LOAN WAS LEGITIMATE.

The next contention of plaintiff below is that plaintiff in error refused to accept the amount of his principle and accrued interest and cancel the loan a long time before its maturity. And as supporting this proposition they present his letter to Mrs. Herbert of July 18, 1900, (found on page 87 of the record) in which he offers to release for $1,300.00, and claims that by reason of taxes that he had paid, expenses he had incurred, and the holding of the principal five months before the loan was closed, his claim amounts to $1,280.00 and he wants the $1,300.00 to compensate him for the loss of five years' contract. If it be fraud or oppression for a creditor to refuse to cancel a loan he has made for an investment upon a five years' contract at any time that the debtor may get ready to pay, then almost any mortgage in this territory may be cancelled. Nothing is known better than that those who loan money for an investment do not want their money paid and the loan cancelled before maturity and none of them permit it without a bonus unless expressly stipulated otherwise in the contract. Wagg had been to considerable trouble in the matter, and at the expense of a trip from Wisconsin to this country to look after the security, had paid the taxes and was agreeing in this letter to carry the loan until after the maturity of the third year's interest in the following November. It must be borne in mind that he was not demanding his principal; his letters above quoted to Herbert and Mrs. Herbert and Eagleton expressly state that he does not care to cancel the loan; that he does not demand payment of the principal, but interest and taxes He had made the loan as an investment, and nothing is better established than the right of the creditor, who has loaned money on a long time, to refuse to accept less than the entire amount of his debt and the interest that will accrue in satisfaction of his claim. He, therefore had the right to have insisted on $1,400 00 besides taxes and penalties as the terms of settlement. Had he accepted the principal with accrued interest, as contended by plaintiff below that he was bound to do at any time, he would have been absolutely loser upon the loan, losing taxes and the interest upon the money for five months, which he had held subject to their order and execution of the mortgage, as well as all costs and expenses he had been put to by reason of the loan.

We say, therefore, there was no oppression, even if he had refused to accept anything less than the full amount that would accrue to him at the end of maturity of the loan and at the end of the five years.

It was a simple matter of compromise upon which he had a right to demand any sum of money less than such principal and thereafter accruing interest and taxes as a condition of cancellation of the contract. Or he had a right to insist upon what he did insist on, not that they should cancel the loan at all, but that they should pay the interest and taxes as they matured and give him the benefit of his investment.

As Mr. Wagg states in his letter, that the concession he offers is not one that he would make to a business man, and it was one that business men would not expect.

We have discussed these propositions submitted by plaintiff below at length, and rehearsed the evidence upon them, because we want to fully satisfy the conscience of the court that there was in no sense wrongdoing on the part of Mr. Wagg, but that his conduct was in all matters and things that of a fair, clean business man. But the court below found no fraud, no oppression, no misconduct on the part of Mr. Wagg with reference to these matters, but reached its decision solely upon the next contention of plaintiff below, and to which we now come, and that is that the value of the land, retained by Wagg under the settlement deed, was so much in excess of the amount which he was at the time entitled to recover from Mrs. Herbert that the transaction of itself constituted an undue advantage, and that the relations between the parties were such that Wagg could not accept any property in satisfaction of his claim materially in excess of the amount then due on said claim and that transactions between mortgagor and mortgagee would be scrutinized with such suspicion that if it appear that the mortgagee had in any manner secured more than the value of the mortgage debt that the court would set aside the settlement; and the court further found that the value of the 55 acres of land retained by Wagg was largely in excess of the amount due upon his claim, and for that purpose stated in his decision that he would take judicial knowledge of the fact that any such lands could not be worth less than $40.00 per acre, and this despite the fact that no lands in Pawnee county had ever sold for such a price at that time.

We are not asking this court to weigh the testimony which is hereinbefore stated in order to determine what the value of the land actually was. And yet for the enlightenment of the court and to satisfy the conscience of the court, we do ask the reading of that evidence and the consideration of the knowledge and the means of knowledge on the part of the witnesses who testified as to such value, and consider also the giving of their testimony, the certainty with which they expressed their opinions, the standing of the men who testified, and, although upon this appeal we concede that the court cannot weigh such testimony, but must accept the findings of the court below, advise itself upon this proposition. But, accepting as conclusive the findings of the court that the evidence submitted as to the value of the land by plaintiff below should be absolutely determinative thereof, yet this court must also consider that the question in the case should not be and was not as to the actual value of the premises conveyed, but whether or not there might be such an honest difference of opinion as to that value that the settlement made might have been reached pursuant to legitimate negotiations between the parties. Even if the allegations as to the value of this land as presented by plaintiff's petition were admitted as true, we submit that the evidence shows conclusively that it was a subject upon which there could be, and was, such diversity of opinion as makes the settlement actually reached within the range of legitimate business transactions.

In *Russell vs. Southard et al., supra,* the case upon which plaintiff below based this action, the Supreme Court says:

> "But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intention may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property all that any one would have been willing to give. We do not deem it for the benefit of mortgagors that such a rule should exist."

This clearly shows that under the old rule and under the legal theory of mortgages the settlement need not have been for the full value of the property, so long as it was for such value as to be within the judgment and approval of ordinary business men having knowledge of the value of the property. If the evidence in this case proves anything, it proves that whatever the value of the property actually was, and however high it may have been, yet the settlement was within the approval of five of the best business men in the town where the transaction occurred, and having the best knowledge of values therein.

This is conclusive, not only that the settlement was not for such grossly inadequate consideration as to be presumptive evidence of fraud, but also that the transaction was one that could be considered fair by men having better means of information than even the judicial knowledge of the learned judge who tried the case.

But we do not rely solely upon this proposition, but we insist that the premise of the court, in its decision, that there was such relation between mortgagor and mortgagee as prevented the mortgagee from accepting in settlement property materially in excess of the amount of the debt is absolutely untenable in jurisdiction where the mortgage is a mere lien upon the property, as it is in this territory.

The propositions hereinbefore discussed present every suggestion of actual fraud, duress or undue influence contained in the pleadings or evidence, unless there is some such thing as constructive fraud or implied fraud arising out of the relation of mortgagor and mortgagee.

This latter is a distinct proposition asserted by the plaintiff below and directly held by the Territorial Supreme Court, and we contend that the converse is true and discuss the same in our third general proposition.

It will not be necessary for us to premise this argument with the statutes or authorities to show that in this territory a mortgage is a mere lien, and we pass at once to the principal question, citing only the statutes.

Section 10 of Chapter 50 of the Revised Statutes of Oklahoma of 1903 provides:

> "Notwithstanding an agreement to the contrary, a lien and contract for a lien transfer no title to the property subject to the lien."

Section 12, Chapter 8, Sess. Laws, 1897, provides:

> "Every instrument purporting to be an absolute or qualified conveyance of real estate or any interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such."

*Yingling vs. Redwine,* 12 Okl., 64.

**Third.—In Oklahoma, where a mortgage is a mere lien, a mortgagee not in possession may purchase the mortgaged property, and such purchase is not subject to be set aside in the absence of actual fraud, duress or undue influence. This proposition covers Assignments 11 and 43.**

It is insisted by plaintiff below that there is such fiduciary relationship between the mortgagor and mortgagee as makes it incumbent upon the mortgagee in accepting the conveyance of the mortgaged propery in satisfaction of the mortgage debt to see that he allows full value for the property taken. And this is the doctrine and theory upon which the court found against plaintiff in error in the court below.

We insist that the doctrine under the old common law theory of mortgages, or, as it is commonly denominated, the legal theory, the rule should be, and was, cited by the authorities thus:

A mortgagee in possession can only acquire the mortgage's equity of redemption in satisfaction of the mortgage debt, when his settlement with the mortgagor is fair and not at a grossly inadequate consideration. We are familiar with all the authorities cited upon this proposition, and feel confident that there were always two propositions involved:

1st. The rule was applied only to mortgagees in possession, and

2nd. The rule was a limitation upon acquiring the *equity of redemption.*

See the opinion of the court in

> *Russell vs. Southard et al., supra.*
> *King vs. State Mutual Life Insurance Company*, 54 Am. Dec., 683.

In this case, decided by Chief Justice Shaw, he uses this language:

"But it is then intimated that the mortgagee is trustee for the mortgagor; and that on the ground of this fiduciary relation what he receives in that character he must account for. But in truth he is not such trustee. Nothing (an eminent judge has said) is so likely to mislead as a simile. In some very limited respects, a mortgagee is a trustee; as when he has entered, and is in receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a trustee. This point has arisen in many cases, but the recent one is direct to the point and decisive; *Clark vs. Sibley*, 13 Met., 210. Wilde, J., in giving the opinion of the court, cites the case of *Cholmondeley vs. Clinton*. 2 Jac. & W., 183.

If this is true in England, where the rights of the mortgagor, after condition broken, are purely equitable, and such as are administered by a court of equity, much more in Massachusetts, where the right to redeem, after condition broken, is ascertained and regulated by law, as effectually as the right of the mortgagee to hold for the security of the debt.

Certainly before entry for condition broken, the relation of the mortgagor and mortgagee is that of contracting parties, and not that of *cestui que trust*, and trustee."

So much as to the fiduciary character of the relation between the parties. But we insist that the other condition is equally absent, viz: that the transaction at bar was not an acquisition of the equity of redemption. First. because it was a purchase of only part of the property. Second, because under the equitable, or lien, theory of mortgages, there is no such thing as an equity of redemption.

As fully substantiating this contention, we quote the following from 3 Pom. Eq. Jur., Sec. 1188:

"The mortgage is not a conveyance, nor does it confer upon the mortgagee any estate in the land. It creates a lien on the land, or, in the apt language already quoted, 'a potentiality to follow the land by proper process and condemn it for payment' of the debt. The debt is the principal fact, and the mortgage is wholly incidental or collateral thereto, and intended to secure its payment. The right or interest of the mortgagee, from being a legal estate, is changed into an equitable right, enforceable by an equitable proceeding; it may be assigned and passes to the mortgagee's personal representatives on his death. The mortgagee is not entitled to possession of the mortgaged premises, and can maintain no legal action for their recovery, either before or after a breach of the condition; in fact, the mortgagor's default produces no change in the relations of the parties or in the nature of their respective interests, except that the mortgagee thereupon becomes enabled to enforce his lien by a proceding of foreclosure. The mortgagee's interest being a mere lien, it is wholly destroyed and the mortgagor's estate is left free and unincumbered by a payment of the debt secured by it at any time before the premises are actually sold under the decree of foreclosure; the estate does not then revest in the mortgagor, since it has never gone out of him. On the other hand, the mortgagor's interest, instead of being an equitable estate or right in equity to redeem the land from the mortgagee's ownership, is for all purposes, under all circumstances, and between all parties, the legal estate with all the incidents and qualities of legal ownership, but at the same time incumbered by or subject to the lien of the mortgagee, and liable therefore to be cut off and divested by a sale under decree of foreclosure, if the debt is not paid according to the terms of the mortgage. **It is an entire misuse of language to apply the name "equity of redemption" to this legal estate of the mortgagor;** and the continued employment of the phrase in the legal nomenclature of the states which have adopted this theory of the mortgage is to be regretted, since it is the occasion of constant misapprehension and confusion of thought. It is the natural and inevitable result of this system that in all the states where it prevails the mortgagor is not ordinarly, under ordinary circumstances, compelled to apply to a court of equity for relief. Being entitled to retain possession of the premises, after a default, he is generally in a position to act on the defensive, and is not obliged to bring a suit in equity for a redempiton. On the other hand, the mortgagee, not being permitted to recover possession and hold the land, is compelled to enforce his lien by a suit in equity, in which he obtains a decree for the sale of the mortgaged premises. In several of the states the remedy of a strict foreclosure has been denied to him by statute."

Speaking of the extent of difference between the equitable and legal theories of mortgages, Chief Justice Crosier, in *Chick et al. vs. Willets*, 2nd Kan., 390, says:

"Mortgages here differ essentially from mortgages at common law, and in the states referred to. At common law a mortgage was a conveyance with a defeasance and gave the mortgagee a present right of possession. Upon it, even before the conditions were broken, he might enter peaceably or by ejectment. If the condition was broken, the conveyance became absolute. If the money was paid when due, the estate reverted to the mortgagor; if not so paid, the estate was gone from him forever. After a time the law of mortgage was so modified that the legal title was not considered as having passed until the condition was broken. At a later day another still more important innovation was made. While it was considered that, upon condition broken, the mortgagee became invested with the legal title, and was entitled to possession, yet in that condition of things his title was subject to defeasance. The rents and profits operated as cancellation, *pro tanto*, of his conveyance, and when they reached a sum sufficient to reimburse his original investment, with such use as the law allowed, the legal title reverted to the mortgagor, and he would be entitled to the possession; and he had a right to facilitate this operation by payment of the money, and upon application to a court of equity his title would be disencumbered of the cloud the mortgage cast upon it. This right of the mortgagor was called 'the equity of redemption,' and, considering the then prevalent theory of mortgages, the phrase was peculiarly appropriate and expressive. The title had passed, but he had a right to redeem; and it is among the highest glories of equitable jurisprudence that at so early a day the means of enforcing this right were supplied. Some of the states still adhere to the common law view, more or less modified by the real nature of the transaction; but in most of them practically all that remains of the old theory is their nomenclature. In this state a clean sweep has been made by statute. The common law attributes have been wholly set aside: **the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning, except in reference to those theories—**with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and realize the new condition of things. The statute gives the mortgagor the right to the possession, even after the money is due, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises; thus negativing any idea of title in the mortgagee. It is a mere security, although in the form of a conditional conveyance, creating a lien upon the property, but vesting no estate whatever, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control it—except that the security shall not be impaired. He may sell it and the title would pass by his conveyance—subject, of course, to the lien of the mortgagee."

Nothing can make it clearer than do these authorities that there is no such thing as an "equity of redemption" under the equitable theories of mortgages, and indeed there is nothing of that nature. The rights of the parties are transposed; instead of having an estate upon condition as he had at common law, the mortgagee has a mere equity, giving no right of immediate possession and no means of oppression. Instead of being able to force his debtor to pay him an unreasonable sum, the debtor is in possession and, as every lawyer knows in actual practice, often exercises his advantage by forcing a settlement for less than the amount due, in order to escape the expense, delays and trouble of extended foreclosure proceedings.

But we are not without ample and extended authority directly in point. We are not required to depend upon the maxim that the rule at common law is abrogated, because the reason therefor has failed, but the courts are united in holding that the old doctrine of fiduciary relationship between the parties that limited their rights in dealing with each other, is abrogated, and that where the equitable theory of mortgages prevails, the mortgagee may deal with the mortgagor as with a stranger, many of the cases going so far as to hold that this is true even when he is in possession.

But, first citing some cases that there is no fiduciary relationship between the parties, we call the attention of the court to the following:

*Trimm vs. Marsh*, 54 N. Y., 599; S. C., 13 Am. Rep., 623.

In this case the New York Court of Appeals goes into an extended discussion of the relationship between the mortgagor and mortgagee. The opinion is most masterly in distinguishing the rights of the parties under the old, as distinguished from the new, theory of mortgages, and holds that there is no such fiduciary relationship between the parties as constitutes the mortgagee a trustee, even after he is in possession.

A similar decision is to be found in *Cornell vs. Woodruff, 77* N. Y., 203.

In this case the court says:

> "In the absence of any special covenant to that effect, a mortgage imposes no duty upon a mortgagee to protect the interest of the mortgagor; and the former is not prohibited from acquiring an adverse claim to or lien upon the mortgaged premises, and from enforcing it with the same effect as a stranger might."

In *McLaughlin vs. Acom.*, 50 Pac. Rep., 441:

The Supreme Court of Kansas, where the conveyance was absolute upon its face, but given as a security, holds that there is no fiduciary relationship between the parties and says:

> "One who stands in the mere relationship of a mortgagee is under no obligation to pay taxes on the mortgaged premises, nor is he precluded from acquiring a tax title thereto, based on tax sales made before he went into possession of the premises."

It will be noted that this is a case of an absolute conveyance, and that the mortgagee was in possession.

In an extended note to *King vs. Cushman,* 89 Am. Dec., 372, is found the following:

> "In fact it is very generally held that a mortgagee may purchase (the mortgaged property) as freely as any third person."

And the note is followed upon that proposition by an extended citation of authorities.

In Sugden on Vendors and Purchasers (10th Ed.), 228, occurs the following language:

> "A sale by mortgagor to mortgagee stands on the same principle as a sale between parties having no connection with each other and can only be impeached on the ground of fraud."

In *Adler et al. vs. Vankirk Land and Construction Company,* 21 South. Rep., 490, the Supreme Court of Alabama uses this language:

> "There is no such fiduciary relation existing between a mortgagor and mortgagee, as such, as will justify the mortgagor in relying on statements made by the mortgagee in a settlement, without taking steps which are open to him to ascertain their truthfulness, except at his own peril."

*Walker, Admr., vs. Farmers' Bank,* 10 Atl., 94.

In this case the mortgagor mortgaged a portion of the premises to a mortgagee, who sold it at an advance of about $2.500.00 over the mortgage debt, within three months, and yet in holding that the mortgagee could not set aside the conveyance the court uses this language:

> "In Delaware a mortgage as between the mortgagor and mortgagee, so long as the former continues in possession of the mortgaged premises, is merely a security for the payment of the money, and does not absolutely convey the legal title to the premises, but is a lien on the property of so high a nature that it is not divested by a sale on judgments subsequently obtained against the mortgagor. Yet, if the mortgagee is in possession under the mortgage, and the conditions of it be broken, it is no longer in the power of the mortgagor, nor any one claiming his title by virtue of the sale on such judgment to recover the possession in ejectment. His only right in such a case is to redeem the premises by paying the mortgage. A mortgage in this state being but security for the payment of a debt **creates no trust and establishes no fiduciary relation.** The mortgagee has but a chose in action."

It will be noticed in this case just quoted that there were allegations of fraud and undue influence and taking advantage, etc.

The case of *Stoutz vs. Rouse*, 4 South. Rep., 170, is a case presenting a much greater difference between the value of the land as found by the court and the amount of the mortgage, and the equitable features are stronger than the case at bar. In this case the court says:

> "In a bill in equity to redeem land which had been conveyed to the mortgagee by a warranty deed to avoid foreclosure of the mortgage thereon, brought after the expiration of the time to redeem reserved to the grantor by special agreement when the conveyance was made, an averment that the land was worth much more than the consideration for which it was conveyed, unsupported by an averment that the land would probably have brought more at a foreclosure sale than the price ob-

tained for it, is no ground for equitable relief. * * * The transaction clearly extinguished the mortgage debt, which amounted nearly to $6,000.00. Admitting the mortgaged lands to be worth as much as $10,000.00, as avered in the bill, the complainant shows in our mind no grounds for relief. * * * The mere fact that the mortgagor was in bad health does not show undue influence or unconscionable advantage taken of him by the mortgagee."

In *Peagler vs. Stabler*, 9 South. Rep., 157, the Supreme Court of Alabama says:

"The evidence is widely different as to the value of the land. Perhaps there is no question upon which witnesses testify more at variance than upon the market value of the property. Some of the witnesses place the value much greater, and many others place it at about the price received. The evidence on the point falls far below that which would justify the annullment of the deed on the ground of inadequacy of price. There was no pretense but that the conveyance was intended to be in satisfaction of the mortgage and debt. * * * The deed should not be set aside as oppressive."

Se also

*McMillion vs. Jewett et al.*, 5 South. Rep., 145.

In the case of *Waterson vs. Devoe*, 18 Kan., 223, the court says:

"The principles in relation to dealings between trustee and *cestui que* trust, as adopted by courts of equity, do not apply to the case of a mortgagor and mortgagee. Dependence and the duty of protection are not involved in this relation and they may deal only subject to the ordinary principles."

In *Watson et al.*, 38 Pac. Rep., 527, the Supreme Court of California adopts the language of *Green vs. Butler*, 26 Cal., 591, as follows:

> "Independent of authority, no argument is necessary to show that on general principles a mortgagee has the same capacity to contract with reference to his interests in the mortgaged premises that he has with reference to any other property."

There are many features which the case at bar has with the case of *Amos, Admr., vs. Livingston et al.*, 26 Kan., 126. In this case Mr. Justice Brewer, writing the opinion of the court, says:

> "There is no legal inhibition on a mortgagor selling the mortgaged property to the mortgagee in satisfaction of his debt, and where such a sale appears and nothing unfair or unreasonable in its circumstances or conditions is shown by the party challenging it, it will be upheld. Mortgagor and mortgagee have the unquestionable right to deal with the property and with the debt as they deem best, subject only to the condition that no unjust and unfair advantage is taken."

*Albert A. West et al., Admr., vs. Reed*, 55 Ill., 242;

The court uses this language:

> "While it is true that contracts between mortgagee and mortgagor for the purchase or extinguishment of the equity of redemption are regarded with jealousy by courts of equity, and will be set aside if the mortgagee has in any way availed himself of his position to obtain an advantage over the mortgagor, yet this principle does not preclude any *bona fide* agreement between the parties

which will operate to vest the entire estate in the premises in the mortgagee, **and mere inadequacy of consideration will not of itself deprive such an agreement of its binding effect."**

This case is quoted from and this same language is used in *Schanlan vs. Schanlan,* 25 N. E. Rep., 652.

In Coventry's Notes to First Powell on Mortgages is found this language:

"A sale by mortgagor to mortgagee stands on the same principle as a sale between parties having no connection with each other, and can only be impeached on the ground of fraud."

*Goree vs. Clements,* 10 South. Rep., 906.

In this case the court goes into the details of the transaction and uses this language:

"The mortgage debt was $560.00 and complainant testified that the property was worth $1,200.00. The bill alleged a long friendship between the parties, and an agreement on the part of the defendant to extend the mortgage debt when due, which agreement was denied by defendant. It was not alleged that defendant made any false representations as to the legal effect of the deed. Held, that the evidence failed to show fraud or undue advantage."

*TenEyck vs. Craig,* 62 N. Y., 406.

In this case the court says:

"There is in truth no relation analogous to that of trustee and *cestui que* trust between mortgagor and mortgagee created by the execution of a mortgage. The mortgagee is not a trustee of the legal title, because under our law he has no title whatever. **He may deal with the mortgagor in respect to the mortgaged estate upon the same footing as any other person. * * * He may do what any other person may do, and his acts are not subject to impeachment, simply because he is mortgagee.** Nor is the mortgagee converted into a trustee by taking possession as mortgagee of the mortgaged property."

We will be pardoned for quoting at length the following from the case of *DeMartin vs. Phelan*, 47 Fed., 761. The court says:

"Complainant seeks to maintain this action upon the theory that a mortgagee holds a financial advantage over the mortgagor which, of itself, has a tendency to prevent him from dealing with the mortgagee on an equal footing, and that such a relation placed the mortgagor under the power of the mortgagee and destroys free agency. In support of this theory counsel for complainant contends that in cases of this character the principles of law are almost as stern and inflexible as those which govern transactions between a *cestui que* trust and his trustee, and that the sale of the property under such circumstances as are alleged in the bill will never be sustained, unless *bona fide*, and for a full, fair and adequate consideration. Can this contention be sustained? What is the relation of mortgagor and mortgagee? Under the law of California, and most of the other states, the mortgagee takes no estate in the land, but has only a lien thereon as security for the debt until foreclosure. He can at any time make a *bona fide* purchase of the equity of redemption or interest of the mortgagor and thereby acquire an absolute title to the mortgaged premises. There is no trust relation between the mortgagor and mortgagee when unaccompanied by possession. The mortgagee does not owe the mortgagor any duty to protect the equity of redemption. There is no relation analogous to that of trustee and *cestui que* trust between the mortgagor and mortgagee created by execution of the mortgage. No fiduciary character exists between them which prevents the mortgagor from buying the property at foreclosure sale and holding the title thus acquired adversely to the mortgagor. The mortgagee can at all times deal with the mortgagor in respect to the property mortgaged precisely upon the same footing as any other person, and may purchase liens or claims against the property for less than their face value, and hold them against the mortgagor for the full amount.

"Under these general principles, which are well settled and supported by numerous authorities, how can it consistently be claimed that the averments of the bill in this case are sufficient to maintain this action? Parties who are in poor and destitute circumstances if they have any property, and wish to dispose of it, are often compelled by their necessities to sell their property for less than its real value; but if they obtain all that they ask for it, or voluntarily accept what is offered, and there is no fraud, deceit, oppression, improper or undue influence or confidential relations existing between them, courts of equity have no jurisdiction, power or authority to set aside such a transaction. There is in most cases a contest between the purchaser and the seller of real property; the purchaser usually endeavoring to buy the property at the lowest price the owner is willing to take, and the owner trying to get the highest price the buyer is willing to pay. In a certain sense the purchaser with ready money at his command takes advantage of the circumstances of the owner who is poor and by reason of his poverty is willing to sell for whatever is offered. When the parties are dealing at arms length in the open market, and no unfair and improper measures are used or misrepresentations are made, it would be absurd to say that a court of equity, years afterwards when the party selling had met with financial success, and acquired sufficient means to pay the purchase money, could be called upon to annul the sale. It is only in cases where the *bona fides* of the transaction is called in question, and when fraud or other like causes above enumerated is alleged, that courts of equity are authorized to interfere. In such cases the relation of the mortgagor and mortgagee is 'always a circumstance which creates suspicion and aids in the proof of an allegation of oppression and undue advantage, where there is a gross inadequacy of price and other circumstances tending to show fraud.' * * * The fact that $204,000 was paid for property alleged to be worth $230,000 under such circumstances certainly does not show such a marked undervaluation or inadequacy of price as would, of itself, shock the conscience, or raise any presumption of fraud or undue advantage, that would justify a court of equity to annul the sale. The demurrer is sustained."

This case upon appeal to the Circuit Court of Appeals was affirmed in *DeMartin vs. Phelan,* 51 Fed. Rep., 865; S. C., 2 C. C. A., 523.

The opinion upon the appeal was written by McKenna, circuit judge. And the same is valuable upon the question of laches, which occurs also in the case at bar. This opinion denies relief and sustains a demurrer to a bill in equity, which alleges that defendant purchased mortgages against plaintiff's property, as a means of security title to said property, and for no other purpose, and while plaintiff was in indigent circumstances, which defendant well knew and took advantage of, and by means of said mortgage indebtedness induced her to sell him her equity of redemption and to make him a deed of said lands for $19,000.00, whereas they were in fact worth $45,000.00.

*Martin vs. New Rochelle Water Co. et al.*, 42 N. Y. Supp., 893.

We quote extensively from the opinion in this case as follows:

"In December, 1891, the plaintiff was the owner of a farm of some 32 acres which she had purchased in the year previous for the sum of $6,500.00 . The plaintiff paid for the farm by the execution of a mortgage for the whole amount of the purchase money secured by a collateral mortgage on other property owned by her. The defendant, Iselin, was the principal stockholder of the defendant, the New Rochelle Water Company. That defendant desired to obtain from the plaintiff part of the farm for its water works. The complaint charges that Iselin negotiated with the plaintiff for such purchase and that the plaintiff refused to accede to the terms offered: that thereupon Iselin purchased the $6,500.00 mortgage and then renewed negotiations with the plaintiff, and threatened to foreclose unless plaintiff acceded to his terms; that under the fear of such foreclosure, and the loss of the whole property, plaintiff executed an agreement to sell 20 acres to the water company for $200.00 an acre, and subsequently in pursuance of such agreement executed a deed to that defendant. The purchase price was credited on the mortgage and the remainder thereon was subsequently paid off by the plaintiff. It was also charged that the lands so conveyed were worth $18,000. The complaint prayed that the deed to the defendant corporation be declared a mortgage and that she be allowed to redeem. The trial court found the facts as charged in the complaint, except that it made no finding as to the value of the land conveyed, other than it was worth more than the price paid, and gave judgment for the plaintiff substantially as prayed for.

The deed to the water company cannot be adjudged void as secured by duress, in the ordinary sense of the term, because the defendant, Iselin, threatened nothing more than his legal rights. *Knapp vs. Hyde*, 60 Barb., 80. The fact that the plaintiff purchased a mortgage from malice towards the defendant, and solely with the view to sue upon it, constituted no defense to the action for its foreclosure. *Morris vs. Tuthill*, 72 N. Y., 575. If the deed can be avoided it can only be upon the ground of the relation between the parties, and on the theory that the conveyance was substantially made to the mortgagee. Undoubtedly the rule has been often stated that a purchase by the mortgagee of the mortgagor's equity of redemption will be closely scrutinized and sustained only when fair and for adequate consideration. **But this rule has generally been declared in jurisdictions where the right of the mortgagor and mortgagee are different from those which, since the revised statutes, obtained in this state.** * * * The court has simply found that the property was worth more than the amount paid for it. That which courts of equity sought to restrain by the rule invoked was the forfeiture by the mortgagor of his equity of redemption, by reason of default of payment of his debt, obtained under cover of a release of the equity of redemption, or a conditional sale.

But apart from the question whether the conveyance to the water company was justly subject to avoidance, we think that plaintiff, by her laches, has lost any right to avoid it. When she made the sale she was in default for nearly two years' interest on the mortgage and in the payment of two years' taxes on the property. These arrears were cleared up by the proceeds of the sale and the mortgage stood as reduced until the payment of the remainder due upon it. For four years the plaintiff took advantage of the sale, and made no complaint of it. As already said, there is no finding of how great the true value of the property was. The evidence presents the usual diversity of opinion experienced when the value of country real estate is sought to be ascertained. There is much evidence tending to show that the plaintiff obtained the value of the property. If the plaintiff wished to disaffirm this sale, she should have proceeded, after a reasonable time, to take action, and not wait for years to speculate upon a possible enhancement in value. The case differs entirely from that where a party has been forced or tricked to give up his equity of redemption for a nominal consideration. By the failure of the plaintiff to disaffirm her deed for this period of years, we think she has ratified it."

There is much more in the opinion that is valuable and to the point in this case, and it will be noticed, too, that the case is also valuable upon the question of laches.

This case is later affirmed by the New York Court of Appeals in a memorandum decision on the opinion of the lower court, said memorandum decision appearing in the 57 N. E. Rep., 1117.

The Supreme Court of California makes the doctrine as broad as it is possible to make it, and much stronger than we contend for. The following is a statement of the rule laid down by them from *DeMartin vs Phelan*, 47 Pac. Rep. (Cal.), 356:

"There is no such fiduciary relationship between the mortgagor and mortgagee, as will render it fraudulent for the mortgagee **to purchase the mortgagor's equity of redemption as cheaply as he can."**

This same case upon first hearing is found in 24 Pac. Rep., 725.

With these citations of authority, although there are many more of like tenor and effect, we rest our position that there is no such relationship between mortgagor and mortgagee as prohibits them from dealing as strangers, and unless there is such ground as would avoid the mortgagee's purchase of the mortgagor's title, if the relationship of mortgagor and mortgagee did not exist, then courts of equity will not interfere to compel the mortgagee to show that he allowed mortgagor all that the land was reasonably worth. We have in the discussion of these questions permitted the courts of leading authority in this country to argue them for us. The authorities cited come from every part of the United States and some of them are from states in which the legal theory of mortgages is still in force. They cover half a century and appeal to the court, with their reasoning so cogently as to be irresistible.

Following then the evidence in the court below, which failed to show any fraud, undue influence or oppression, and following also the opinion of the court below, in which the learned judge made no finding of fraud, or undue influence, we believe these authorities absolutely annihilate the decision holding that there was undue advantage in the mortgagee compromising his claim against the mortgagor for property which plaintiff only alleges to be worth $5,500.00, but which most of her own evidence showed to be worth only half that sum, even though the claim of plaintiff in error at the time of the compromise should be held to be legitimate, only for principal, taxes and interest accrued to the time of the settlement.

We believe that we have fully met every proposition of plaintiff below, and fully and clearly shown that there existed no fraud, oppression or undue influence, such as warranted the setting aside of the settlement deed, or decreeing it to be a mortgage, and we come therefore to the discussion of the defense, in which, considering that the plaintiff had made a case of her pleadings and evidence, we take the position that the admitted facts constitute an absolute defense to the maintenance of the action and the validity of the judgment actually rendered.

### THE DEFENSE.

Omitting in this discussion the consideration of any of the denials of defendant's answer, we take up the consideration of the affirmative allegations which are substantiated by the proof. and concerning the facts of which there is no controversy.

**Fourth: In the case at bar the plaintiff was guilty of such laches and acquiescence in the final settlement as barred this action both because it was barred by the two year statute of limitations, and because the changed conditions made the avoidance of the transaction inequitable. This proposition is covered by assignments 14, 15 and 47.**

Of these in their order:

### THE ACTION IS BARRED.

Our code has since 1893, contained the following provision found in the Statutes of Oklahoma (1893). Chapter 66, Art. 3, Sec. 18:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards."

Third: "Within two years: An action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

That duress and undue influence constitutes fraud and that the same limitation applies to each has frequently been held.

*Moore vs. Moore* 56 Cal., 89.
*McMillan vs. Cheeney* 30 Minn., 519.
S C. 16, N. W. Rep., 404.

It is, however, contended by plaintiff that she is excused from proceeding until she discovered her rights by inquiring of an attorney, but the statute is not so and it is only stayed during her ignorance of the *facts* constituting the fraud and is not dependent upon her ignorance of the law. Knowledge of facts sufficient to induce inquiry is all that is required to set the statute in motion.

*Board of Commissioners vs. Renshaw*, 99 Pac. (Okla.), 638.
*Black vs. Black et al.*, 68 Pac. (Kan.), 662.
*Pickenbrock and Sons vs. Knover et al.*, 114 N. W. (Ia.), 200.
*Donaldson et al vs. Jacobitz*, 72 Pac. (Kan.), 846.

In the case at bar the plaintiff knew every fact constituting the alleged duress and undue influence at the time, but even if she was in ignorance of the facts it is upon her to plead and prove the facts necessary to toll the statute.

*Redd vs. Brun et al.*, 157 Fed Rep., 190.

In this case the Circuit Court of Appeals, for the Eighth Circuit, says:

> "If a complainant would maintain a suit instituted after the expiration of the statutory limit, he must plead and prove especially facts or circumstances which show he was not guilty of laches which take his case out of the ordinary rule and make it equitable to allow its maintenance after the statutory period has expired."

And again:

> "If he failed to discover the fraud within the statutory limit, he must plead and prove the time when he discovered it, the means by which he found it out, the impediments which prevented its earlier discovery, and the diligence he exercised.
>
> If by the exercise of ordinary diligence he could have discovered it in time to have brought his suit within the limit fixed by statute, he was guilty of laches and the suit cannot be maintained."

In the case at bar plaintiff testifies, on pages 177 and 178, of the transcript, that she knew of the fraud at the time of the transaction.

## LACHES.

The defense of laches, it may be admitted, is not a common one in this new country. Its character makes it specially adapted in litigation affecting land titles, of which there has been little in our Territory. There is, we believe, no case decided by the Supreme Court of this Territory in which the doctrine of laches has been invoked. This means, of course, that both the bench and bar are less familiar with this doctrine of equity than we are with many unique questions peculiar to our local civilization. We made be pardoned, therefore, if to refresh the mind of this court we rehearse in this brief a number of cases showing the variety of circumstances under which it has been invoked and sustained by the courts throughout the country. We will attempt, therefore to call to mind some of its principles and make clear that the case at bar falls entirely within them.

It may be suggested that the doctrine of laches as a doctrine of equity, barring claims, is independent of statutes of limitation, it may on the one hand toll beyond the statutory period, and on the other it may greatly reduce the same. Mere lapse of time is only one ingredient of the defense of laches, and it may be a very minor element.

The gist of the defense of laches is, change of situation of the parties and acquiescence on the part of the plaintiff in the wrong which he seeks to have remedied. And it is to be remembered that the defense of laches is a defense against real, actual and substantial wrong, and may be interposed where there is such change in the situation of the parties, by lapse of time, by acquiescence, by increase in the value of the property conveyed, by apparent abandonment of a right, by loss of evidence, death of parties, or possible injury to third persons, as makes it probably that the rescission or cancellation of a conveyance will give the party rescinding an unjust advantage.

In *Alsop vs. Riker*, 155 U. S., 448, the Supreme Court says:

> "Equity in the exercise of its inherent power to do justice between parties will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statutes of limitation.
>
> The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule."

In *City of Leavenworth vs. Douglass*, 53 Pac. Rep., 123, the Supreme Court of Kansas is equally explicit in its declaration that the defense of laches is not dependent solely upon the lapse of time. That is a case in which the City of Leavenworth had passed, on June 28, 1886, an ordinance authorizing the construction of a Union Depot in a public street in that city. The railroad company proceeded with the construction of that building until June 30, 1887, just one year later; at which time an adjoining property owner sought to enjoin the completion of the building, and, although the action was not barred by any statute of limitation, the court held that the property owner, who sat silently by for one year and saw the expenditure of large sums of money in these improvements, was barred by his laches.

A good case upon laches pending improvements for a brief time is *Thornton vs. Natchey*, 129 Fed Rep., 84.

The matter of limitation of actions and the doctrine of laches as an equitable defense is clearly discussed in

> *Johnson vs. Atlantic et al. Company*, 156 U. S., 648.
> *Pen. Mut. Life Ins. Co. vs. Austin*, 168 U. S., 699.
> *State vs. Mayor of LaCrosse* (Wis.), 77 N. W. Rep., 167.

This latter case is one in which the laches extend but for a few months, but the plaintiff had permitted large sums of expenditures in improvements, and the court held that he was barred by his laches.

> *Grass et al. vs. Portland Town & Mineral Company et al.*, 54 Pac. Rep., 845.

"In this case the complainant and one B agreed with defendants to purchase certain real estate for the purpose of platting it into a town. Subsequently by mutual consent, the agreement was cancelled; when B secured a party, to whose rights the defendants succeeded, to furnish the means and carry out the enterprise under the new agreement, substantially the same as the former except as to parties. The complainants filed their bill alleging a fraudulent combination between the defendants and B to defraud them of their interest in the enterprise. Plaintiffs had full notice of the new enterprise for more than a year prior to the bringing of the action, during which time defendants were permitted to expend large sums of money in furtherance of the scheme. Held, that the plaintiffs were guilty of such laches as barred a recovery."

In the case of *Robers vs. Van Nortwick et al.*, 58 N. W. Rep., 757, the agent had betrayed his trust by purchasing and selling to a third party certain stocks which he had agreed to, and had purchased for his principal. His principal discovered the facts at once and tendered the third person the price of the stock and demanded the same, and three years later, brought suit. Held, that the plaintiff's laches barred his recovery.

In *Schlawig vs. Purslow et al.*, 8 C. C. A., 315, the rule is laid down that:

> "One who stands silently by, and permits another in possession and claiming absolute ownership to move old buildings, and erect an expensive new one, will not be aided by a court of equity."

*Wheeler vs. McNeil*, 41 C. C. A., 604, S. C., 101, Fed., 685.

In this case the rule is laid down that a party having the right to rescind a contract for fraud, is required to disaffirm the same at once on discovering the fraud, to restore any consideration received and place the other party as near as may be in *statu quo.*

**"Silence, delay, acquiescence, or the use or retention of any of the fruits of the contract for any considerable length of time after the discovery of the fraud is in itself an exercise of the option and constitutes a complete and irrevocable ratification.** Nor does the law permit him to speculate upon his option or lie in ambush for a year, until changes in the conditions or mortgage makes his interest plain before he makes his choice."

*Scheftel vs. Hays*, 7 C. C. A., 308, S. C., 58 Fed., 457.

"A vendee entitled to rescind his contract for fraud. must act promptly, especially in times of great speculative activity; and where on discovering the fraud, he merely notifies the vendor of an intention to claim damages, and does not elect to rescind, until the lapse of three years, when the land had depreciated to the fraction of its former speculative value, it is then too late to avail himself of this remedy."

*Kinne et al. vs. Webb et al.*, 4 C. C. A., 170, S. C., 54 Fed., 34.

"Complainant, in April, 1883, made a contract of settlement with other beneficiaries under her husband's will, whereby she quit-claimed, for a cash consideration, all her interest in his estate, which consisted chiefly of mining lands. In July, 1883, she brought suit to set aside such contract for fraud, which suit she dismissed In February, 1890, she brought suit in the February court on the same grounds, the property in the meanwhile having increased greatly in value. Held, that she was guilty of laches."

*Parson vs. McKinley*, 57 N. W. Rep. (Minn.), 1134.

"It is the duty of a party who has been induced to enter into a contract through fraud, to act upon the first opportunity after discovering such fraud, and to rescind the contract by repudiating its obligations and restoring what has been received under it, if he desires to avail himself of his right to rescind.

He is bound to elect what course he will pursue within a reasonable time, at least, after learning of the deception, and is not at liberty to hesitate and delay or wait for a future view of his own convenience, or of the market value of the property, before determining the question of affirmance or recission."

*Paine vs. Harrison,* 37 N. W. Rep., 588.

This is a case in which the vendee agreed in a contract for the sale of real estate, to erect a certain building upon the land, and to lay the foundation in the summer of 1886. Plaintiff knew that the foundation had not been laid in October of that year. On February 25, following, plaintiff gave defendant notice of his election to pay back all payments and interest. Held that he was guilty of such laches as barred his right to rescind.

*Grymes vs. Sanders,* 93 U. S., 55.

"Where a party desires to rescind a contract upon the ground of mistake or fraud, he must **upon the discovery of the facts** at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred."

See also:

*Shelby vs. Creighton,* 91 N. W. Rep., 369.
*Hoyt et al. vs. Latham et al.,* 143 U. S., 553.
*Twinlick Oil Company vs. Marbury,* 91 U. S., 537.

28 Am. & Eng. Enc. Law (2nd Ed.), 1027, and cases there cited.
*Litchfield vs. Brown et al.*, 17 C. C. A., 28.

"The right to rescind a conveyance, arising out of the collusion of the vendors agent, with the purchaser, and their concealment of the fact that the land was valuable for coal mining purposes as well as the right to recover damages from the purchaser, held to have been lost, where after obtaining knowledge of the facts, plaintiff neglected to disaffirm the sale for three years and three months, during which the lands were conveyed to other parties, who expended large sums in prospecting and developing them."

A delay of three years in bringing action by a tenant to set aside a conveyance, obtained by fraud is held to be fatal, in

*Blackman vs. Wright*, 65 N. W. Rep., 843; 6 Cyc., 300-301-302.
*Straight vs. Junk et al.*, 8 C. C. A., 137; S. C., 59, Fed., 321.

"A petition which shows that a director of a corporation protested in writing against the misappropriation of funds of a corporation, on first learning thereof, but that such cause, nevertheless continued for two years show facts convicting himself of laches, if he fails to further aver that he was ignorant of such continuance."

*Sagadahoc Land Co. vs. Ewing et al.*, 65 Fed., 702, S. C., 13 C. C. A., 83.

In this case Judge Taft, speaking for the court says:

"Rescission of a contract for the purchase of lots of uncertain value, dependent on a speculative enterprise, asked because of false representation, will not be granted where suit is not brought until three years and a half after making the contract, and two years after the falsity of the representations must have been known."

*Curtis et al vs. Lakin et al.*, 36 C. C. A., 222,
S C., 94 Fed., 251.

In this case, a partner locating two mining claims in his own name, but which should have been rightfully held for the partnership, transferred the same to a corporation, and about one year thereafter and, after the mines had been valuable, plaintiffs brought suit to dissolve the partnership and to decree corporation a trustee for benefit of plaintiffs. Held that plaintiffs had been guilty of laches barring the suit.

*Day et al. vs. Ft. Scott Inv. & Imp. Co.*, 38
N. E. Rep., 567.

"A delay of two years before praying for cancellation of a contract on the ground of false representations is fatal laches where the parties discover the falsity of the representations soon after they are made."

*Perry vs. Pierson*, 25 N. E. Rep., 636.

"A contract will not be set aside on the ground of mental incapacity of one of the parties where the evidence merely show that he was laboring under intense anxiety and depressions of spirits, and that he understood the effects of what he was doing, and could exercise his will with reference thereto. * * *

Where a vendor does not sue to cancel the sale for fraud for more than one year after he has consulted an attorney and resolved to cancel it, **and enjoys meanwhile the consideration paid him,** his right of action is lost by his laches."

> *Sheffield Land, Iron & Coal Co. vs. Neill* (Ala.), 6 South, 1.

"Bill was to rescind, was brought after two years and seven months on the ground of fraud. The land in the meantime having increased considerable in value, held that the delay was fatal to the relief asked."

The case of *Hatch vs. Ferguson et al.*, 57 Fed., 959 is a very instructive case to be considered, in connection with the case at bar as applying the doctrine of laches in a case where the grantor used for her own benefit the purchase money and saw innocent purchasers making improvements upon the land conveyed. We quote as follows from the opinion;

"A deed made by an attorney in fact of an Indian woman, who, though illiterate and unable to converse in English, is yet possessed of a good understanding, and is capable of acting independently, will not be set aside on the ground that she was imposed on and induced to give the power without knowledge of its effect, even if voidable for this reason, where she made no attempt to repudiate the sale, but accepted and used for her own benefit the purchase money, voluntarily delivered possession of the land, and although the purchasers were making large expenditures on the property, and it was raising rapidly in value, made no claim until it had made increase many fold, and until a lawyer sent by one of her friends had consulted her."

This case afterwards went to the Circuit Court of Appeals of the Ninth Circuit, and was there affirmed, in *Hatch vs. Ferguson*, 14 C. C. A., 41. There is so much in common, between this case and the case at bar, that we ask a careful reading of the opinions of both courts.

*Conley vs. Rue et al.*, 35 N. E. Rep., 824.

"Where land which various parties value at from $200.00 to $300.00 per acre is sold at foreclosure sale for $87.00 per acre, this discrepancy of price is not so great as to be cause for setting aside the sale. * * * And a delay of more than three years in bringing suit to set aside such sale, during which time the land has increased greatly in value, constitutes laches."

In a case where plaintiffs claim to have been deceived as to the responsibility of the defendant, and thereby induced to enter into a contract with him, but upon his making an assignment accepted employment with him and assisted him about the business, the court held in *Arnold vs. Hagerman et al.*, 17 Atl. Rep., 93, that:

"Upon discovery of fraud, which has induced a contract, the defrauded party must promptly elect whether he will rescind or not, and if he then evinces an intention not to rescind, the contract becomes as to him irrevocable by estoppel."

See also:

*Mulves vs. Givens et al.*, 87 Ill., 367.

In a case of an absolutely void sale, had under a trust deed in Kansas, and which trust deed was given to secure a debt, and the sale made by the trustee without foreclosure, and where the complainant knew of the sale in a few months after it was made, and knew that the purchasers buying at such sale, thought that they had good title and were making improvements on the premises, and yet complainant made no protest, the Circuit Court in Kansas, in a decision by Judge Brewer, sustained a demurrer to the petition on the ground of laches The case is reported as *Fraker vs. Hauck, et al.*, 36 Fed., 403.

A delay of three years in bringing suit is held too late, where mortgagee foreclosing under power of sale, purchased at his own sale.

*Goodell vs. Dewey*, 100 Ill., 308.
*Bedford vs. Moore et al.*, 54 Mo., 448.

"Where a party at a judicial sale constitutes himself trustee by deterring others from bidding, and the party entitled to redemption accepts the deed for part of the land tendered in satisfaction, it amounts to a forfeiture of further redemption."

This case is instructive upon the fact in the case at bar, that Mrs. Herbert accepted conveyance of a portion of the land, claimed title thereunder, made conveyance of a portion thereof, applying the proceeds to her own use, thereby effectually freeing the lands she so conveyed from any claim or lien that plaintiff in error might have had.

*Learned vs. Foster*, 117 Mass., 365.

See *Schradski vs. Abright et al.*, 5 S. W. Rep., 807 (Mo.):

"Plaintiff by absolute deed conveyed land, which was afterwards purchased by defendants who built on it. Plaintiff paid no taxes on the property, nor made any protest while improvements were being made and had encouraged the defendants in their purchase, but now claimed that his deed was given only as a mortgage to secure a debt. Held that a court of equity will not interfere when a party has slept on his rights, and induced others to act on the belief that he had abandoned them."

Also, *Kline vs. Vogel*, 1 S. W. Rep., 733 (Mo.):

"Three years after the sale of property under a trust deed, the purchasers of the equity of redemption brought suit in equity to set aside the sale. After the purchasers had made repairs and improvements and paid taxes, all of which plaintiff knew. Held that they were guilty of laches, although the statutes of limitation had not run."

In *Schlawig vs. Fleckenstein*, 45 N. W. Rep., 770:

"Mortgagor was out of the state at time of foreclosure, but had actual notice eight months before expiration of the redemption period, and knew that his family had given possession to the mortgagee who bought in the property. He made propositions to redeem and furnished money to another to purchase a junior mortgage and caused an action to be brought to enforce the right of redemption under it. He knew after the expiration of the redemption period, that defendants had sold part of the lands and that valuable improvements were being made thereon, but did not assert any right or interest in the property. Held that he was estopped from seeking to enforce the right to redeem."

In *Hamilton vs. Lubukee*, 99 Am. Dec., 562 (Ill.), the court says:

"Mortgagor on obtaining knowledge of sale under power must immediately take steps to set it aside for irregularities or a ratification will be implied."

*Parkhurst vs. VanCourtland*, 7 Am. Dec., 427.

In this case the court holds:

"Parties entered upon land under insufficient memorandum in writing, whereby he promised to sell them the premises. They made valuable and permanent improvements, relying on statement of owner that no advantage would be taken. Held defendant estopped from claiming insufficient memorandum and specific performance decreed."

See 2 Pum. Eq. Jur., Section 965.

A very careful decision coupled with the announcement of most equitable principles, and applying the doctrine of laches, in a case where there had been a conveyance of property by mortgagor to mortgagee, and the same subsequently treated as the property of the mortgagee, is found in.

*Ward vs. Sherman et al.*, 192 U. S., 168

In this case the opinion is by Mr. Justice Brewer and he says:

"The right to rescind is an affirmative right asserted by the vendor the former mortgagor and, being such, it must be asserted by him within a reasonable time. * * * Apply this doctrine to the case at bar. The property was turned over on the contract of sale. Ward was left in possession for over three and a half years without a suggestion that he was only a mortgagee in possession. He had a right to believe that he was the owner. If a contract had not been made he could have foreclosed his mortgage and acquired title by sale under foreclosure proceedings. He dealt with the property as his own, he gave his time, skill and labor to the work of looking after and caring for it.

It is impossible to replace the parties in the situation they were in at the time the contract was made. It would be grossly inequitable to deprive him of the benefit of his time, skill and labor, and give it to the mortgagee, who all these years did nothing and gave no notice of any question of the completeness of Ward's title. It seems to us that the doctrine of laches applies with force, and upon the pleadings that the court should have adjudged the defendant not entitled either to a recision of the contract, or to hold the vendee as mortgagee in possession."

*Ellis vs. Ellis et al.*, 23 S. W. Rep., 996.

"After the execution of a deed to his wife, and her subsequent death, the grantor as guardian of her children, treated the land as theirs, asked lawyers if the deed was sufficient to give them title, stated that if it was not, he wanted to make it so. Held that even if the deed was obtained by undue influence, there was a ratification of it."

But these principles of equity have been crystalized into positive statute in our territory.

Section 761 Wilson's Annotated Statutes 1903, which reads as follows:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it **so far as the facts are known,** or ought to be known to the person accepting."

Let us apply all these principles that are by the expression of the common conscience of the judiciary of this country to the facts in the case at bar.

In the first instance Mrs. Herbert solicited a division of the property. In order to procure it she made an affidavit, that she believed her husband to be dead, and agreeing that if he was found to be alive, that she would procure his signature to the conveyance. This occurred in May, 1901. She procured the settlement, Wagg surrendered to her the note evidencing her debt, cancelled her mortgage of record, and conveyed to her 25 acres of the land, which she had then conveyed to him by the settlement deed. She was free from duress or undue influence. She was in no manner entangled, excepting by her own poverty, which was not occasioned in any manner by this plaintiff in error. Did she at once rescind? Did she at once notify Wagg that she had been swindled and that he would have to account to her? On the contrary she acquiesces; states to her neighbors as they testify upon the stand, that she thought that she had done as well as she could do in settlement under the circumstances. July the 6th, she goes further and for the purpose of enabling Wagg to sell this property, and to have and hold unquestioned title thereto, she makes the affidavit, a copy of which is attached to the answer as Exhibit "A," and found on page 34 of the record. In this affidavit, when she is free from all pressure, when no one is threatening her, when there is no undue influence, when her mortgage had been cancelled, she renews her covenant to obtain her husband's signature to the deed in event that he is found thereafter to be alive, and this she does as she states in the affidavit, to give Wagg further assurance of title. She knew then every fact with reference to this transaction that she knows now; it was always an open book to her; nothing was ever concealed, no misrepresentations were ever made, **oppression, oppression, oppression,** is the gist of her complaint, and yet when freed from this transaction, holding in her hand, the evidence of her debt cancelled and discharged, she renews, ratifies and affirms the deal she had made. Is she not within the principle of *Ellis vs. Ellis, supra?*

But this is not all, later in the same fall, residing in full view of all the land, and on the portion that was conveyed to her, she sees the same platted, surveyed and laid out as an addition to the town. Money is spent for these improvements, she sees that if Wagg has no title, that innocent purchasers must suffer. If in her heart there is intention to ever contest the title, does she act fairly either to Wagg or to the public by her silence and acquiescence, and by baiting with her affidavit, the hook which she now claims Wagg was casting out to defraud purchasers? But her iniquity did not stop here. She sees innocent purchasers buy this property and encourages them so to do. They not only part with their money for the lands, but erect thereon valuable and lasting improvements. Improvements much more valuable than the property upon which they stand, and this goes on and on. For nearly two years after the sale of lots began, she sits idly by and sees people spend vast sums of money, improving property which she claims, but does not disclose her claim. Is she within the principles of the cases cited above, wherein the conscience of court after court has denounced such conduct? But she does not pause here, more than a year after the settlement with Wagg, taking advantage of the freedom of the land, which she retained, from the lien of Wagg's claim, and taking advantage of his deed of the same to her, made at the time of the settlement, and thereby taking advantage of the transaction and taking conscious benefit therefrom, she sells more than 15 acres of this tract to Swan. Does she run to Wagg with proceeds of the sale to satisfy the obligation she owed him? Does she even ask him for an accounting and offer to pay or put him in *statu quo?* Does she not rather take advantage of this transaction, and thereby affirming the original settlement, take the money for her own, and by the way, it is worth noting, that after Wagg has laid out this addition, and more than a year after the settlement, she sells this tract to Swan, thereby affirming the original settlement, and giving as direct a lie to her testimony, that the land was worth $100.00 per acre, at the time of her settlement, as it was possible for her to do. In the meantime the Railroad Boom had come to Cleveland. From a hamlet it was building to a little city, and yet this tract of land which she sells Swan, and which adjoins not only the town of Cleveland upon the one side, as did the part that she sold to Wagg, but on the other side joined this new addition of Wagg's, and instead of getting $100.00 per acre under all these advantageous circumstances, she sold for **$50.00 per acre.**

But we will not digress further to comment upon this phase of the case. For a year after making this sale to Swan, she sits silently by and sees the improvements go on, holds the proceeds of the sale, and then after Wagg had sold a large portion of his addition, giving warranty deeds therefor, and becoming liable upon such warranties; after he had bestowed his thought, his effort and attention to the tract, after he had taken all the risk and carried the enterprise to a success; after he had made new contracts for the sale of the lands still in his hands undeeded, and by which contracts he agreed to convey them, the plaintiff in this case makes her first open claim and brings this action.

In this recital of what transpired, there is not the slightest departure from the open and notorious facts, undisputed testimony and admitted conditions as they appear in the record in this case.

All the cases that deal with the subject, insist that greater diligence is required of the person who proposes to assert a claim against property of a speculative character, or that is passing into the hands of innocent purchasers. And in consideration of all these facts, and that by her settlement, she had prevented plaintiff in error from foreclosing his mortgage, and had held him at bay, as to his debt, interest and taxes, during all this time, can it be stated that she did not have conscious advantage from her transaction, that she did not reap benefit from it, and that equity owes her the restoration of all this property?

With these remarks and with these authorities we must leave this branch of the case with the court, and realizing that this brief is already too long to secure attention from the court, we will abbreviate the authorities, upon the succeeding subject which is,

**Fifth:—The plaintiff was and is estopped to set aside the transaction by having taken conscious advantage thereof. Assignments 16 and 45 are discussed under this heading.**

As conclusive of the proposition that Mrs. Herbert's action in selling a portion of this land, after having secured a release thereof, by virtue of Wagg's deed to her was an affirmance of the transaction, we cite *Belle vs. Keepers* (Kan.), 17 Pac. Rep., 785.

The court says:

> "After the discovery of fraud in a contract, the party imposed upon sells one of the tracts of land embraced therein, he waives the fraud and affirms the contract. And he could not in any event rescind that part of the contract relating to the other part and recover back what he has paid thereon, without restoring or offering to restore to the other party the full amount of the proceeds of the pieces sold by him."

See also:

*Shubert vs. Stanley,* 52 Ind., 46.

As applying in similar cases the doctrine of estoppel, we cite the following:

*Hardey vs. The City of Keene,* 32 Atl. Rep., 759,

where the court says:

> "Where a senior mortgagee, relying on the word of a junior mortgagee that he will not redeem, if the first mortgage is foreclosed, instead of foreclosing takes a quit claim deed, and thereafter makes valuable improvements, the junior mortgagee will be estopped from claiming any interest in the land under his mortgage."

*Bedier vs. Reaume et al.* (Mich.), 55 N. W. Rep., 366.

"Where an heiress conveys her interest in the estate of decedent, takes mortgages in payment, and assigns the mortgages, and, after discovering that the deed has been procured from her through fraud, and for an inadequate consideration, pursues the assignee (of the mortgages) for several months to recover the amount to be paid for the mortgage, it amounts to a ratification of the sale, and she is not entitled eight months thereafter to have the deed vacated."

*Knagg vs. Mastin*, 9 Kan., 532.

"In case of void deed the creditors permitted the grantee to enter into possession and make valuable improvements and became tenant of the grantee. It is too late after two and a half years to set aside the deed, and the grantors are estopped."

*Sinley vs. Davis*, 53 Pac. Rep., 686.
6 Cyc., 611.

In the case of *Scott vs. Walton et al.*, 52 Pac., 180, a grantee had a right to rescind for fraud, but remained several months in possession of the premises, leased the same and endeavored to sell the same. Held, too late to rescind.

*Ingalls vs. Burns*, 2 Am. Dec., 593.

"Where a man stands by and sees another purchase land to which he has a prior claim and does not disclose his title, it is concealment and is fraud which will forfeit his title."

*Davis vs. Simpson*, 9 Am. Dec., 500.

"If one interested in having a purchase by a trustee at his own sale vacated, know the facts, and being under no disability, stands by and sees the trustee use and improve the property as his own, equity will not grant relief."

In the case at bar it will be noticed that Mrs Broadbank testified (pages 399 and 400 of the record), that Mrs. Herbert, upon inquiry made of her as to the condition of the title to these lands, by intending purchasers, had said that Wagg's title was good, and she recommended the title to the inquirers.

This does not operate as an estoppel, simply against innocent purchasers, but shows an election upon her part to treat the conveyance as valid; shows that after all oppression or undue influence is removed, she still concurs in the transaction, and brings the case within the principles announced in *Schradski vs. Albright*, 5 S. W. Rep., 807, cited *supra.*

It is also worthy of mention, that even after Mrs. Herbert had concluded to make some trouble over this matter, after the return of her husband, that she proposed to seek her remedy against Mr. Wagg in damages. (See page 396 of the record.) This brings the case within *Scheftel vs. Hays,* 7 C. C. A., 308, cited *supra.*

Mrs. Herbert, also long after the "settlement deed" and after these lands were platted and occupied by purchasers, expressed herself as satisfied with her bargain with Mr. Wagg, (see page 308 of the Record), and by her contract and affidavit of July 6, 1901, she brought herself within the principle of *Ellis vs. Ellis, et al.*, 23 S. W. Rep., 996. cited *supra*.

Mrs. Herbert does not deny any of this evidence, and it stands as unquestioned.

If a party may in this matter blow hot and cold, await the development of property, in which he claims an interest, by other parties, all the time acquiesceing in such other parties title, induce other parties to purchase portions of the land, take conscious benefit of the settlement, use the proceeds of such settlement, prevent a debtor from enforcing his debt for years, require him to pay taxes and permit him to expend large sums of money in improvements and in every way acquiesce in and ratify the settlement deal, and the property becomes valuable by reason of the rapid development of the country, and the turning of the land into a townsite, and if after all these have been done and acquiesced in by a plaintiff, she can come into a court of equity, and be adjudged to have acted with reasonable promptness, and not misled a defendant to his injury, then the courts from almost every state in the Union, and including the federal courts as well, have had most gross misconception of their administration of equity in other cases. It is to be noted that the plaintiff is not an illiterate person, but one of the brightest and shiftiest witnesses that was ever upon a witness stand; that she is a school teacher; a book agent; had been in the millinery business; had been the life companion of a man engaged in hot-air enterprises of promotion, etc., and in no sense does she come within any of the principles of leniency applicable to illiterate persons.

**Sixth: The court erred in holding that there was any fraud, duress or undue influence upon the part of Wagg. This proposition covers Assignments 36, 37, 38, 39, 40, 41 and 44.**

This general proposition is covered by the brief and argument upon the previous propositions.

The gist of the plaintiff's complaint is as heretofore stated that:

First: Wagg wrongfully recorded the escrow deed and claimed title thereunder.

This has been met by the proposition that he had a right to take and record the escrow deed when he did. That it justified any claim he made and that he always admitted plaintiff's right to redeem and that even if his claim was not legally correct still an erroneous claim is not fraudulent.

Second: Plaintiff's contention that Wagg took possession and deprived her of the means of paying the debt is not sustained by a scintilla of evidence, he having only harvested the hay, as she says, after asking her and meeting no objection, and as he and Drown say with her actual consent.

Third: Plaintiff's contention that it was oppressive to refuse to accept the debt and accrued interest after he had been to as much or more expense than the interest amounted to and long before the maturity of the loan, is fully met by the proposition that a lender is not bound to cancel a loan before maturity and it would be especially unjust to require him to do so when he had been to great expense in protecting it.

Fourth: The inadequacy of consideration is never of itself sufficient to set aside a conveyance but is only evidence tending to show or sustain proven fraud, duress or undue influence. The evidence in this case does not show, when given its strongest construction against Wagg, such gross disparity between value and price paid as raises any presumption of fraud and as we have fully shown, the parties occupied no fiduciary relation.

These propositions cover every suggestion of fraud, duress and undue influence contained either in the pleadings or evidence—they even cover that thing called in the opinion of the court, "Constructive fraud," whatever that may be.

We pass therefore to the consideration of the errors occurring at the trial and covered by our seventh general proposition:

**Seventh: There was material error in the admission of evidence as specified in Assignments 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.**

## ERRORS AT THE TRIAL.

Thus far in this brief we have discussed only the substantive law of the case, and the equities of the parties as they appear from the record.

We will now present for the consideration of the court, errors in the proceedings in the admission and rejection of testimony at the trial of the case, such as we feel assured ought to reverse this case, even if the equities were against us, for they manifestly prejudiced the rights of the plaintiff in error.

One of the principal contentions of plaintiff below was, that the plaintiff in error had violated the terms and conditions of the escrow contract, by taking the deed out of escrow before he was authorized to do so under the terms of the escrow agreement.

We think we have fully satisfied the court that there had been, for more than six months, breach of the conditions of the escrow agreement, and that he was entitled to take the escrow deed, at the time he did so.

The real controversy with reference to this matter was upon the question of what constituted the escrow agreement.

Plaintiff below insisted that the letter of September 25, 1893, written by Wagg to the Herberts constituted that agreement.

Plaintiff in error insisted that the agreement was comprehended in the note and mortgage, and his letter of November 12, 1898.

To substantiate the issue upon her part, the plaintiff below introduced the evidence over the objection and exceptions of the plaintiff in error, a memorandum found on pages 81 and 82 of the transcript. As printed in the record this memorandum appears to have been signed, but as stated in the record by Mr. Clark, it was not signed by Mr. Herbert or Mrs. Herbert, and no evidence was introduced or pretended to be introduced, and it was not claimed that said memorandum was signed by Herbert or Mrs. Herbert, or that this memorandum was ever assented to by them, or in any way represented the final escrow contract, yet the court permitted this to be introduced, and may have been influenced in his decision thereby.

It will be noticed that the terms of this memorandum dated later than the letter upon which plaintiff below relied, are different from the letter, in that the letter provides that six months after default in any terms of the mortgage that the escrow deed should be delivered, while the memorandum simply provides that it should be delivered in the event of default in interest for six months.

We insist that the admission of this evidence was erroneous; that it did not sustain or tend to sustain plaintiff's allegations of the terms of the escrow; that it did not appear to be any agreement between the parties; was not executed, never signed by Herberts, and had no competency in the case. That instruments do not prove themselves, and that where a party relies upon a contract, that is not admitted by the pleadings, he must prove the execution thereof by the parties, before it becomes competent, material or relevant, is so elementary, that we will not make any extended citations of authority, see however,

9 Cyc., 757;
Ruckman's Appeal, 61 Pa. St., 251;
*Wilbur vs. Stoeple*, 46 N. W. Rep., 724.

In this last case the Supreme Court of Michigan says:

> "An unsigned memorandum of agreement, drawn up by plaintiff's attorney, previous to the contract, drawn according to his testimony, pursuant to instructions, but from whom did not appear, was improperly admitted, being incompetent and immaterial."

*Apache Co. vs. Barth*, 177 U S., 538.

On page 77 of the record, begins a letter written by Mr. L. M. Drown to Mr. Wagg, under date of July 29, 1898, the same being part of the negotiations when the Drowns were trying to induce Wagg to loan this money to the Herberts. This evidence was objected to as being irrelevant, immaterial and incompetent and admitted over the objection of the plaintiff in error and his exceptions. The theory upon which the evidence was admitted is stated by the court immediately following the admission of testimony. Certainly this letter is irrelevant and immaterial as being *res inter alios acta* unless the theory upon which the court admitted it, makes it material. This letter did not come and is not shown to have come into the hands of the plaintiff in this case until the trial, when it was delivered to her in pursuance to her demand for full correspondence between Wagg and every other party with reference to this land Mrs. Herbert was neither helped nor injured by this letter, as an inducement to make the loan, as she denied that Drown was in any manner her agent or acted for her. As to the court's theory that it shows what information Wagg acted upon, we submit that it was entirely immaterial as to his information upon values in making the original loan, or what his information of values was at all. The theory of the court seemed to be, that if Wagg knowingly got a bargain in the land, or in other words got the land for less than he really knew it was worth, that on account of the relationship between the parties the sale might be avoided. It was upon this theory that this evidence was designed to be harmful by the plaintiff and was admitted by the court. But we submit that Wagg's knowledge of the values was absolutely immaterial upon either view of the law. That is, in the event the court should hold against all the authorities, that Wagg was bound to see that Mrs Herbert got full value for her land, then his knowledge or ignorance of the values would be immaterial but if the court should hold, as we believe the doctrine of equity clearly is, that Wagg might buy as a stranger might, then both the value of the land and Wagg's knowledge of the value of the land is absolutely immaterial. Of course upon our view of the law, this evidence would not be prejudicial, but as being part of what we believe to be an erroneous theory upon which the case was tried and decided, we submit that it is material error as evidencing that erroneous theory.

On page 78 of the transcript appears a letter from S. R. Wagg to one of the Drowns. To what Drown does not appear, and as stated by counsel, when he introduced the letter, he did not know. We submit that in this state of the evidence, the said letter is absolutely incompetent, irrelevant and immaterial as objected, and that its admission was error We have no idea as to the theory upon which it was introduced, and there was a great mass of letters of this character introduced over objection that seemed to serve no purpose except to confuse the issue and encumber the record, and we submit that their admission was error for this reason if for no other.

On page 109 of the transcript appears a letter written by Wagg to W. E. Diem of Cleveland. This letter was introduced over the objection and exception of plaintiff in error, as being incompetent, irrelevant and immaterial. This incompetency arises out of the fact, that no sufficient foundation was laid for the introduction of the copy in evidence. The loss of the original was not proven, and the letter was not shown to have ever been transmitted. Further than this the letter is irrelevant and immaterial. It was claimed by plaintiff below that this letter showed that Wagg claimed the land in controversy, and that this letter was one of his claims, and by which plaintiff below was prevented from making a sale of the land. We submit that this letter shows on its face that it was written after the final settlement had been agreed upon between the parties, and not only after the final settlement had been agreed upon between the parties, but after Mrs. Herbert in her letter of April 9, 1901, found on page 110 of the transcript, had agreed in writing to execute the conveyance and asked Wagg to re-transmit the papers to her for her signature. Under these circumstances was Wagg not justified in assuming to own the property, and referring intended purchasers to his agents, and can there be any predicate of oppression and undue influence laid because of such a claim?

This letter was introduced and admitted by the court evidently under the theory that it showed a claim to the property by Wagg before he had a right to claim it, and as it could not be material or relevant upon any other issue, and as immaterial and irrelevant upon that issue, being written at the time that it was, we insist, that its admission was error and prejudicial error.

On page 120 of the transcript, occurs a letter written by Drown to Wagg under date of November

8, 1901, and being written six months after the final settlement. Counsel's theory upon which the letter was offered in evidence is found on page 121 of the transcript, and it is fair to assume that the court admitted the letter upon that same theory, that it showed that Drown discovered six months after the contract had been closed with Mrs. Herbert, that a railroad was to come to Cleveland, and that there would be a sharp advance in the prices of real estate, and that he thereby knew that six months previous to that, he was taking advantage of Mrs. Herbert in making this settlement. This class of error, which either arose from a misunderstanding of the judge. as to the time when the letter was written, or because of the erroneous theory upon which he tried the case, is of the most prejudicial character. It is to be assumed, that if the court admitted it, he admitted it because it had weight upon the issue, and no more unsound argument could be presented, than that argued by counsel for plaintiff below for the introduction of the latter. And if the court below, misled thereby, assumed that this letter did throw light upon Wagg's knowledge or intentions at the time of closing this deal, and took the letter into consideration for that purpose, it was a great wrong to this plaintiff in error, as tending to show that he was over reaching when he had no knowledge of the expected advance in prices which did not occur until much later.

We submit further upon the introduction of evidence, that the testimony of each of plaintiff's witnesses, who testified as to the value of land, was incompetent, and that the competency of the witnesses was not shown, and that objection was made to the introduction of the testimony of each witness upon that ground. The testimony of Litten upon that point is found upon page 122 of the record; the testimony of John R. Skinner upon that point is found upon page 196 of the record; the testimony of Mott is found on page 189, and the testimony of John H. Crismon is found on page 203. These witnesses variously testified themselves that they did not know the values of the land; that they were not experts; that they were making a mere guess, and they made no such general showing of competency or knowledge of the subject matter, upon which they testified, that authorized them to testify at all. Unless there be some requirement of knowledgement or experience that one man has over another to qualify him to testify upon such questions, then testimony as to the value of land is entirely useless and senseless, and the matter should be left to the knowledge and experience of the jurors, unless there be a requirement that the witness testifying shall have more knowledge or experience or competency than the jurors. If anyone and everyone is competent to testify concerning the value of land, then it ceases to be a subject for evidence and becomes a subject for judicial knowledge, as indeed the court in this case in its opinion substantially held.

On page 129 of the transcript, counsel for plaintiff below attempted to bring the case within the rule covering transactions with illiterate and ignorant persons and over the objection and exceptions of plaintiff in error, introduced evidence to show that plaintiff had no business experience, in the entire absence of any allegation in the petition of ignorance, illiteracy or mental weakness; or that plaintiff even relied upon the statements of plaintiff in error. This testimony in the absence of any such allegations, was certainly erroneously admitted, as tending to raise or substantiate an issue not made by the pleadings. If there is any meaning in the requirements that evidence shall be material and relevant to the issues actually made, then the objections of plaintiff in error ought to have been sustained.

On page 131 of the transcript, plaintiff below was permitted to testify, that she had made arrangements with another party, to sell the hay which this plaintiff in error harvested and applied on the debt. This testimony was introduced over our objections and exceptions. It can have no possible materiality, it is not the way to show that plaintiff in error had not allowed for the hay, all that it was actually worth, and it is not the method of proving the value of the hay. There is no theory upon which such testimony could be admitted. It is concerning a conversation between other parties no knowledge of which is brought to the attention of the plaintiff in error, to establish an implied agreement on his part, that he would pay an equal sum, but like a great mass of evidence introduced, only served to encumber the record.

On page 149 to 151 of the record, Mrs. Herbert was permitted to testify over the objections and exceptions of the plaintiff in error as to her reason for not going to the distant city (Muskogee) to try to sell this land at that place. Her whole testimony upon this subject is incompetent, irrelevant and immaterial, but seems to have been admitted by the court, upon the theory, that Mrs. Herbert was oppressed by Wagg, and that this showed the extent of the oppression. Certainly it was entirely immaterial why she did not go to Muskogee, as it was why she did not go to China. It was incompetent to prove that she had an offer. Mrs. Herbert did not testify that a party at Muskogee, who had offered to buy the land, refused to do so on account of the condition of the title, or that she made an effort to sell to him. There might be some question as to the competency of testimony, that she had tried to sell the land, and that he refused to purchase on account of the conditions of the title, but until his failure to purchase is shown to have arisen from that cause, and not from Mrs. Herbert's indisposition to either write him or go to him, there is no materiality or relevancy in the testimony. Perhaps he would have purchased if she had asked him. The question is not why he did not buy, but why she did not try to sell and we insist that is entirely irrelevant, and particularly as Wagg was writing her and urging her to sell as evidenced by his letters heretofore quoted.

It is not fair for the court to assume that Wagg would have prevented the sale when he was urging it and it is not fair, for the court to assume that Mrs. Herbert could not have made the sale, if she had tried. Hence this testimony is prejudicial.

## IN CONCLUSION.

As shown by the transcript of the record, at page 384, this appellant requested of the Oklahoma Supreme Court specific findings covering vital issues in this case, but the petition therefore was by the court overruled in the absence of counsel and in the last hours of the existence of that court. There is, however, nothing stated in the statement of the case by the Oklahoma Supreme Court and in its opinion to bring to the attention of this court vital features of which we complain, and we have presented to this court nothing that was not presented to the Oklahoma Supreme Court, and in fact the brief in this court is almost verbatim with the brief in that court, so that all these questions were squarely before that court and by it fully determined adversely to this appellant.

Knowing that injustice has been done, and believing that the error is so conspicuous upon the record that this court may grant the remedy, this brief is respectfully submitted.

ARTHUR J. BIDDISON.
*Attorney for Appellant.*

Supreme Court, U. S.
FILED
OCT 29 190
JAMES H. McKENNEY,

IN THE

# Supreme Court of the United States.

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SOLOMON R. WAGG,
*Appellant,*

vs.

MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROCKSTOOL ET AL.,
*Appellees.*

No. 29.

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## BRIEF ON BEHALF OF MARY B. HERBERT, APPELLEE.

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E. M. CLARK,
of Pawnee, Oklahoma, and
WATSON E. COLEMAN,
of Washington, D. C.

IN THE

# Supreme Court of the United States.

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SOLOMON R. WAGG,
*Appellant,*
vs.
MARY B. HERBERT, LEROY M. DROWN, JOHN P. ROOKSTOOL ET AL.,
*Appellees.*

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## STATEMENT.

This is an equity case commenced in the county of Pawnee in the territory of Oklahoma, in the Territorial District Court, by this appellee, Mary B. Herbert, against the appellant herein, Solomon R. Wagg. The facts recited in the petition are in substance that the relation of mortgagee and mortgagor exist although the instruments embodying the transactions attempt to conceal the real nature thereof by purporting to convey title. The prayer was for permission to redeem and for such other and further relief as might be considered equitable and just. See petition in record on page 43, and as amended to comply with requirements of trial court on pages 46 and 51.

The other appellees herein were defendants in the trial court, brought in under an allegation in the petition, "That the defendants herein other than the said S. R. Wagg claim to have some interest in the real estate involved herein adverse to this plaintiff, the exact nature of which is unknown to this plaintiff, but that the same is subordinate and inferior to the rights of this plaintiff herein." This action determines their interests so far as they are in privity with Wagg, by reason of their claiming under him they must stand in his shoes as purchasers from him. Just what their interests are as occupying claimants has not yet been determined, nor has the accounting with the appellant been held, all of which is retained in the trial court as is shown in the judgment of the trial court in the record herein on page 346 and 347.

It will be observed from the record at this point that appellant Wagg is the only one who filed any motion for a new trial or appealed, and the judgment of the trial court cannot be reversed or modified except it affects the substantial rights of said Wagg. It will be further observed from the record herein on page 349 and on page 2, that all the appellees in this court other than Mary B. Herbert, who files this brief, are these other defendants in the trial court, and are parties to the appeal both to the Territorial Supreme Court and to this court. That they participated in the trial court in the proceedings brought here, by the same counsel who acknowledged service of the case-made (see Record, p. 35), where Mr. Wrightsman conducted the examination, and on page 351 where they enter appearance and join in the prayer for reversal.

These facts are mentioned here to show that the other appellees, standing in the shoes of Wagg, are bound by the determination of this case to the extent of the issues involved and all questions determined. Such appellees not having appealed are bound by all findings of facts and conclusions of law except such as the appellant Wagg is able to show this court are both erroneous and prejudicial to *his* rights and interests.

Subject to these limitations the action is retained in the trial court for the accounting between Wagg and Herbert, and for further consideration upon the question of the other defendant's rights, claiming an *interest in said lots*, in said Wagg addition, and issues joined or to be joined in the pleadings upon said questions, and that the defendant S. R. Wagg be charged with all the costs of this action (See Record, p. 347). It will also be observed on the same page that the trial court appointed a referee to take testimony to determine the questions arising out of the *accounting* between Herbert and Wagg; and to make findings of facts and conclusions of law, which could not be done until after the determination of the rights of the intervening third parties—the other appellees herein—they being subject to different equities when they are innocent purchasers than when they are not but all having some rights and interests as occupying claimants, which at the proper time are to be considered and determined. From this judgment Wagg appealed and superseded these collateral proceedings (See Journal, on page 348 of Record). In all these collateral proceedings both the principal parties are deeply interested, as the accounting between them is very materially affected thereby. The fact that those proceedings were suspended by the supersedeas bond should be brought out in the judgment herein to avoid a contention which is sure to bring the case back here if it is not settled now. The rights of the other defendants are not affected *beyond the issues tried* nor are the questions of the accounting involved herein, and final judgment cannot be rendered until after the trial of the rights of the subsequent purchasers have been determined and an accounting had based thereon.

Having attempted to clear the side issues we will now proceed to the consideration of the assignments of error to be submitted herein.

## ARGUMENT.

Not having the benefit of the brief of the appellant, and under the rules of this court not having time to prepare a brief after the required service, we are at a loss to know how to begin the discussion of the fifty-three assignments of error contained in the record, for consideration by this court; it requires thirty-three pages to state them and would require a volume to undertake to discuss each separately. To discuss only those which we deem to possess merit would be to make no argument at all.

We are further embarrassed by the prolific multiplying of the supposed errors since filing the motion for a new trial in the trial court.

The motion for a new trial (see Record, p. 347), contained but five assignments of error, viz:

1. Because said judgment is not sustained by sufficient evidence.

2. Because said judgment is contrary to law.

3. Because of errors of law occurring at the trial and excepted to by the defendant S. R. Wagg at the time.

4. Because the court admitted testimony over the objections of the defendant S. R. Wagg, to which he at the time duly excepted.

5. Because the court refused to admit testimony offered by the defendant S. R. Wagg, which refusal was at the time duly excepted to by the defendant S. R. Wagg.

By referring to each of the fifty-three assignments of error in this court (in Record, from page 5 to 38), it will be observed that none of them refer to the fifth assignment of error in the motion for a new trial above quoted.

This then reduces the assignments that are properly before this court to those embraced within the remaining four above quoted.

Turning now to the fifty-three assignments of error to be submitted to this court we will only discuss those that we think were substantially contained in the motion for a new trial.

The first and second refer to the pleadings, and as no such question was presented by the motion for a new trial, we pass them without discussion.

The third assignment asks the court to review all the evidence and reach the conclusion that the plaintiff did not prove *any* cause of action that entitles plaintiff to *any* relief, and to find that there was no evidence to support a judgment of any kind. If the court undertakes to run down this assignment we think we can safely rely on the courts finding some evidence long before it completes the task, and as the testimony is all to the point, we cannot aid the court by citing any particular portion.

The fourth assignment is the counterpart of the third and will be disposed of with it.

The assignments from the fifth to the thirteenth inclusive, are not included in the motion for a new trial and if true would not be prejudicial to the appellant, in fact it is to his advantage that his lien be preserved, after allowing redemption from a transfer obtained by fraud, and no one else are complaining, not even the parties claiming under purchase from him, and no such question was presented in the petition in error to the Supreme Court of the territory as shown by the Record, on page 41. If the deed was not declared a mortgage, but simply set aside upon the ground of fraud, would the appellant be as well off as he is now? This is upon the assumption that the point made is sustained under the evidence and equitable relief prayed for under the facts recited, which we do not concede, but if it were so he has brought the case to this court to raise, for the first time, a point in equity which is in his favor, and had the decree been other than it was, it would have been just ground for him to complain.

The assignments from the thirteenth to the seventeenth and in the forty-fifth, referring to laches, acquiescence and estoppel, are not included in the motion for a new trial. A garbled portion of the testimony bearing on this point is reproduced under the thirty-fourth assignment, but to show that the purported production of the testimony is not a fair and full showing, we direct the court to the plaintiff's testimony on this point, on page 144 of the Record, and the cross examination thereon beginning on page 147. We think the answer to these assignments are best expressed by this court, adopted into this case by the Territorial Supreme Court and produced in the Record, on page 381. Taken from *Russell vs. Sutherd*, in 12th Howard, 139, which is the controlling case on all points involved in this cause and is directly in point, and there the action was not commenced until after the lapse of more than nineteen years from the time the loan became due and sixteen years had elapsed since the defeasance was surrendered and the case at bar commenced within two years from the same kind of a transaction from which we are asking the same kind of relief, and immediately after she was informed of her legal rights in the premises.

The assignments from the eighteenth to the thirty-sixth, refer to testimony heard by the court which the appellant must first show was wrongfully admitted and then that he was prejudiced by reason of the courts having heard the testimony, and as none of it was or can be disputed, and all refers to the transactions between the parties concerning the subject matter of the case, and heard without a jury, the presumption being that the court considered legal testimony only, and must have been considered in connection with all the other testimony, we do not see how this court can say that appellant was prejudiced thereby.

The remaining assignments are subject to objections already raised as to others and to the further objection that they are objections to the reasoning of the court and do not go to the points decided which were that the relation of mortgagor and mortgagee exists and that a right to redeem exists and that the appellant must account to us for the use and occupancy, and we to him for interest, and if third parties have acquired any rights to our detriment, appellant must make good to us.

We now wish to raise the further objection to all the assignments collectively, that they do not fairly present the points by not referring to the pages of the Record, so they can be neither verified or disproven, and for which reason should be ignored by the court.

Not knowing what will be further garbled in the brief for appellant and without referring to pages to prove and establish, we deem it expedient to call attention to assignments number thirty-eight and forty, which are very emphatic as to there being no testimony in the Record to support the finding that the appellant took possession of the premises, or collected rent therefrom, or claimed title under the so-called escrow deed which was given at the same time as the mortgage and as additional security thereto Now to see whether there was any such testimony, we refer the court to the original contract for the loan and the giving of this deed on page 80 of the Record. That Wagg took the deed at that time, "so that he could be the owner of the propetty" (see his testimony on page 307 of the Record). Again on page 308 he testifies that he told Mrs. Herbert that he had taken this deed out of escrow and placed it on record, and that it had been agreed that in case of default in interest or taxes, that the property *was to come into his possession.* He states on the next page that he told her that the land belonged to him. Mrs. Herbert gives her version as to what occurred on pages 130 and 131 of the Record. She says that on his claim of ownership he asked if he could have the hay, and she raised no protest, although she had a standing offer of a dollar an acre for the hay which would have paid all defaults in interest and taxes at that time. On page 200 of the Record a disinterested witness by the name of Nash gives a conversation with Wagg in which Wagg told him before the hay was cut that if he bought the hay, to buy it of him or his agent, that they had it *in their possession* (and it was not yet cut), and that they wanted a dollar and a half a ton standing, and that it would have gone a ton and a half to the acre, and that he did not go to see Mrs.

Herbert after they told him that. The trial court heard this testimony in detail, saw the witnesses, observed their demeanor, and then made the findings of which the appellant complains. Appellant asks this court to interpret this testimony to sustain the thirty-eighth assignment, "there being absolutely no evidence that he did either, and the proof being explicit that he did neither," and in the fortieth assignment that there was an "abundant evidence that he at all times admitted Herbert's right to redeem." Why then does he complain or claim that the decree is prejudicial to him?

We next call attention to the thirty-ninth assignment wherein is a complaint of the finding that Wagg had no right to claim title under the so-called escrow deed and in holding that it did not convey title when the Record, on page 71, contains the statement of counsel that they are not relying on that deed for any purpose in this action.

Inconsistent with these assignments just discussed appellant proceeds immediately in the forty-first assignment to complain of the finding that the taking of possession of the premises, collecting the rents and claiming the title to the land, was taking undue advantage of the mortgagors. We notice in this assignment that counsel puts this assignment in quotation marks but does not accurately quote as may be verified by referring to the language in the Record, on page 377, by intertwining into the language *of the court* the contention *of counsel* that the deed of May 28, 1901, is a "settlement deed," when the trial court, who heard the evidence, found it to have been a mortgage, and of which no complaint is made in the motion for a new trial, and which cannot be shown to be prejudicial to the appellant on any theory of the case, and no other party has complained with the finding of the trial court, and which this court cannot review, but by examination of all the testimony which courts never do on appeal, where there is any evidence to sustain the finding complained of, which is, as designated in the motion for a new trial, either that "said court erred in rendering judgment for defendant in error," or "the court erred in admitting evidence offered, etc.," as hereinbefore discussed. As said by the Territorial Supreme Court in passing on the findings of the trial court (page 377 of Record): "It is a settled rule of this court, and one which we have reiterated and reiterated time and again, that where the evidence reasonably sustains the findings and judgment of the court, or where the evidence is conflicting, it will not be disturbed by this court."

The forty-second assignment is particularly subject to the law last above quoted. The same thing is true of the forty-fourth.

Appellant seems to make a final stand as he reaches assignment number fifty-one (51). Here he assumes to ask this court to take his assumption that what is found to be a transaction between mortgagor and mortgagee, or borrower and lender, and subject to redemption, shall be called a "settlement deed," in the face of the findings of the court, and raised for the first time in this court, which in no case could be prejudicial to appellant, and with no one else complaining, and the complaint that he now makes is that the Oklahoma statute gives a mortgagor the right to redeem from the grantee of the mortgagee, even though the grantee be an innocent purchaser, by paying him his actual outlay and interest, which is the same relief as is given under a breach of warranty in most jurisdictions where title fails. But how is the appellant to show that he is prejudiced by this condition? He is complaining because by his fraudulent acquiring of our property he has not, even by fraudulently conveying it to an innocent purchaser, been able to prevent our recovery of it by paying to the purchaser all he has spent thereon with interest. Is this a proper complaint for him to make to a court of equity? No one else is complaining for no one else has appealed. So anxious is appellant that we shall be actually deprived of our estate beyond the power of actual redemption that he is not only willing to ask a court of equity that we be deprived of the right of redemption because he has wrongfully transferred our property to innocent purchasers, but he is willing also to increase his own liability, for *if* we cannot redeem by reason of his having transferred our property to innocent purchasers, then his liability to us is increased to whatever difference exists between the price received by him and the value of the property at the time we are deprived of the right to redeem. If this assumption is correct he is not only trying to take advantage of his own wrong and fails to show that the decision of which he complains is prejudicial to his interests, but is in fact contending for a holding that would increase his liability to us and evidently hopes to consummate his wrong by beating execution on the judgment should he succeed in inducing this court to give him such relief. For the more equitable terms upon which we can redeem the less will be his liability to us, and under the Oklahoma rule the liability on his breach of warranty would be identical with his liability to us for having to redeem from an innocent purchaser.

Whether any of the grantees of the appellant are in fact innocent purchasers and entitled to the full equity allowed under the rule mentioned in assignment number fifty-one is not before this court at this time, the same being one of the questions reserved by the trial court along with the accounting between the principal parties hereto.

To the fifty-second and fifty-third assignments of error we not only raise the same objections as to the others: that they are not included in the assignments in the motion for a new trial, and would not be prejudicial to the rights of the party complaining, but that they assume conditions not established, and are not consistent with the tender made in open court which has at all times been kept good and appears in the Record on pages 211 and 212.

For the reasons herein set forth, and the merits of the case as appears in the record herein, we ask that the decision below be affirmed, and that the same be adjudged binding on all the grantees and their assigns claiming under the appellant as his privies, standing in his shoes, subject to such rights as they possess as purchasers from a mortgagee in possession according to the statutes of Oklahoma, with or without notice, according to the facts in each instance, and that their interests be first determined according to the rules laid down herein, and that thereafter an accounting be had between the appellant and this appellee according to the equities of the case and that the appellant pay all costs growing out of this litigation.

E. M. Clark and
Watson E. Coleman,
*Attorneys for Mary B. Herbert, Appellee.*